United States Court of Appeals

For the Minth Circuit

CENTURY INDEMNITY COMPANY,

Appellant,

VS.

ROBERT A. RIDDELL, etc.,

Appellee,

and

ROBERT A. RIDDELL, etc.,

Appellant,

VS.

CENTURY INVESTMENT CO.,

Appellee.

Transcript of Record

Appeals from the United States District Court for the Southern District of California

Central Division



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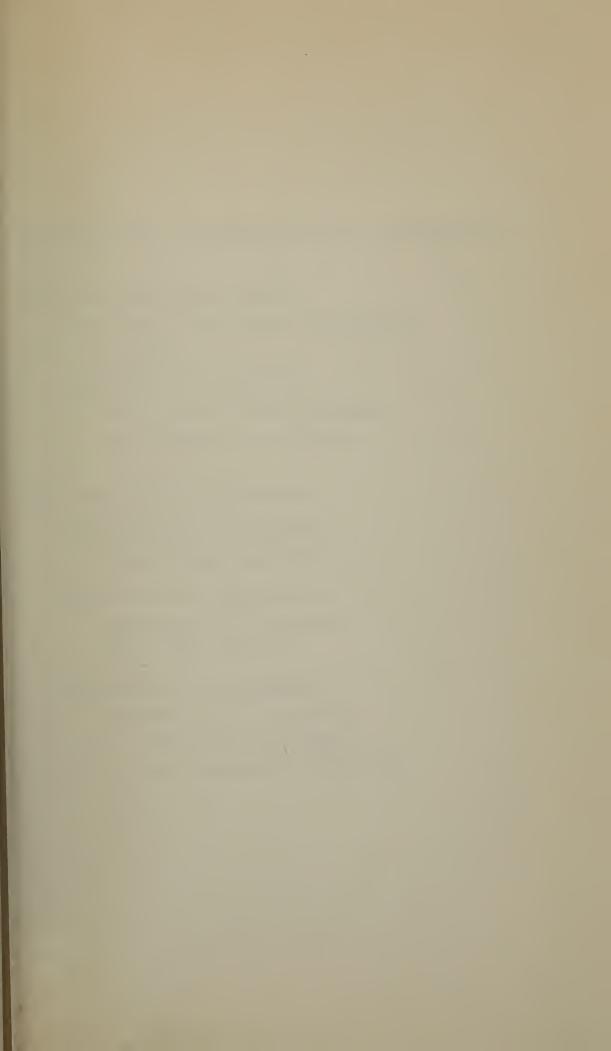
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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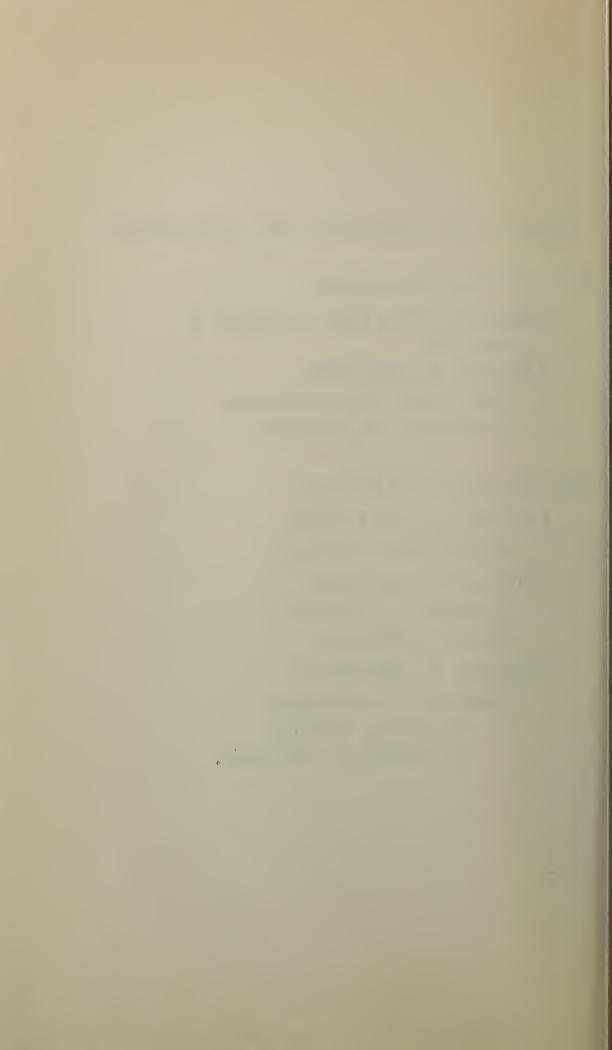
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In the District Court of the United States in and for the Southern District of California, Central Division

Civil No. 959-58-PH

THE CENTURY INDEMNITY COMPANY, a Corporation,

Plaintiff,

VS.

ROBERT A. RIDDELL, District Director of Internal Revenue for the Los Angeles District of California,

Defendant.

COMPLAINT TO RECOVER FEDERAL WITH-HOLDING TAX ON WAGES; TAX UNDER THE FEDERAL INSURANCE CONTRIBU-TIONS ACT, AND TAX UNDER FEDERAL UNEMPLOYMENT TAX ACT, ALL ILLE-GALLY ASSESSED AND COLLECTED

Comes now the Plaintiff, The Century Indemnity Company, and alleges as follows:

First Cause of Action

I.

Plaintiff, The Century Indemnity Company, is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, duly qualified to transact business in the State of California, and having its principal place of business and office in

the State of California at 220 Bush Street, San Francisco, California, and a branch office at 548 South Spring Street, Los Angeles, California.

·II.

Defendant is now and at all times since the 26th day of November, [2*] 1952, has been the duly appointed, qualified and acting District Director of Internal Revenue for the Los Angeles District of California. Defendant is the person to whom the tax withheld on wages, together with a delinquency penalty, the tax under the Federal Insurance Contributions Act, and the tax under the Federal Unemployment Tax Act, together with interest thereon, the sums herein sought to be recovered, were paid, under protest, by the Plaintiff, as hereinafter set forth. At all times herein mentioned, defendant was and still is a resident of the County of Los Angeles, State of California, and of said Southern District of California, Central Division.

III.

Jurisdiction of this Court exists under Title 28, United States Code, Section 1340, and under Section 3772(a)(2) of the 1939 Internal Revenue Code or Section 6532(a)(1) of the 1954 Internal Revenue Code, and Section 7422(a) of the 1954 Internal Revenue Code.

IV.

On October 6, 1953, the White-Ahlgren Company, Inc., hereinafter referred to as "White-Ahlgren,"

^{*}Page numbering appearing at foot of page of original Certified Transcript of Record.

entered into a subcontract with Marine Development, Inc., hereinafter referred to as "Marine Development," to do and complete all concrete work as outlined in Section G, Concrete Work, and Section H, Concrete Curb, Concrete Sidewalks and Sidewalk Steps, in the Specifications and all plans pertaining thereto for the 1,000 Unit Wherry Housing Projects, F.H.A. Projects 129-80007 and 129-80008, and Navy Projects N-09A, Section 1, and N-09A, Section 2, at Camp Pendleton, California. Work under the said subcontract did not, however, commence until on or about December 7, 1953. This subcontract, except for certain modifications as hereinafter set forth, continued in full force and effect until its completion by White-Ahlgren on or about September 17, 1954. A true and correct copy of said subcontract is attached hereto as Exhibit "A," and is incorporated herein by reference as if fully set forth herein.

V.

On or about October 6, 1953, White-Ahlgren made a written [3] Application to Plaintiff for a Contract Bond and Agreement of Indemnity in the amount of White-Ahlgren's said subcontract with Marine Development, viz., \$549,138.20. A true and correct copy of said Application is attached hereto as Exhibit "B," and is incorporated herein by reference as if fully set forth herein. On or about December 2, 1953, a Surety Bond described as Contract Bond No. 291379 was executed by and on behalf of White-Ahlgren as Principal and The Century Indemnity Company, Plaintiff herein, as Surety, and naming

Marine Development as Owner, and Republic National Bank of Dallas, Texas, as Mortgagee, as required by the laws of the State of California as contained in Sections 1183, et seq., Code of Civil Procedure and all acts amendatory thereof, said bond to inure to the benefit of persons performing labor or furnishing materials, appliances, teams or power contributing to the work described in the aforesaid subcontract. A true and correct copy of said Contract Bond is attached hereto as Exhibit "C" and is incorporated herein by reference as if fully set forth herein.

VI.

On or about December 2, 1953, White-Ahlgren opened a commercial checking account in the Security Trust & Savings Bank of San Diego, California, known as White-Ahlgren Trust Account No. 1, for the purpose of receiving funds from Marine Development in payment for work performed or to be performed under the aforesaid subcontract between White-Ahlgren and Marine Development, and from other sources, and to have such funds transferred from said Trust Account No. 1 from time to time to a general account which White-Ahlgren opened in the said Bank on or about December 10, 1953. Checks to be drawn by White-Ahlgren against said Trust Account No. 1 for the payment of wages by White-Ahlgren to its employees under the aforesaid subcontract with Marine Development were subject to countersignature; that is, each check was supposed to be signed by either Albert C. White or W. T. Ahlgren on behalf of White-Ahlgren, and by

any one of several designated representatives of Plaintiff, who was to sign as Trustee. However, through error on the part of [4] White-Ahlgren, the net wages of employees of White-Ahlgren were paid to them out of said Trust Account No. 1, on behalf of White-Ahlgren, on the signature of either W. T. Ahlgren or Albert C. White alone, and without any countersignature by any representative of Plaintiff, for each of the payrolls of White-Ahlgren for the periods ending December 14, 1953, to and including January 4, 1954. Also, during December, 1953, and the first and second quarters of 1954, certain transfers of funds were made from said Trust Account No. 1 to the general account of White-Ahlgren, both carried in the said Security Trust & Savings Bank of San Diego, California, to cover certain wage payments made by White-Ahlgren to its employees under the aforesaid subcontract. No such wage payment checks drawn on said general account of White-Ahlgren for the weekly payroll periods January 11, 1954, to March 8, 1954, or for any other periods, were required to be or were countersigned by any representative of Plaintiff. Beginning with the payroll period ended March 15, 1954, and ending with the completion of its subcontract on or about September 17, 1954, wage payments were made directly from the aforesaid Trust Account No. 1 to employees of White-Ahlgren on checks signed by either Albert C. White or W. T. Ahlgren and a representative of Plaintiff as Trustee. On or about May 28, 1954, a general account was opened by White-Ahlgren in a branch of said Security Trust & Savings Bank of San Diego, at Carlsbad, California, with funds transferred thereto from said Trust Account No. 1, for the purpose of enabling White-Ahlgren to make termination wage payments to its employees working on the said subcontract with Marine Development at Camp Pendleton, California. Checks on the said Carlsbad general account were not required to be and were not countersigned by any representative of Plaintiff.

VII.

On December 2, 1953, at the request of White-Ahlgren, Marine Development made a loan to White-Ahlgren representing an advance of \$10,000.00 against future progress payments under the aforesaid subcontract, and that amount was deposited on the same day in the aforesaid [5] Trust Account No. 1.

VIII.

During the month of March, 1954, it was agreed by and between Marine Development and White-Ahlgren that the latter was approximately 75 units behind the construction rate called for in the aforesaid subcontract. White-Ahlgren gave as the main reason for this delay the fact that it had insufficient working capital to proceed at the rate called for in the subcontract. On or about March 22, 1954, an agreement was reached between Marine Development and White-Ahlgren under which a less exacting performance schedule was set up for White-Ahlgren to complete its said subcontract, and in addition Marine Development agreed to accelerate

progress payments to White-Ahlgren so that they would be made weekly instead of monthly, as provided in said subcontract. It was further agreed that otherwise the said subcontract and the surety bond furnished by Plaintiff should remain in full force and effect, and they did until said subcontract was completed by White-Ahlgren on or about September 17, 1954, as aforesaid. Said subcontract was never cancelled.

IX.

Said subcontract provided that 10 per cent of the subcontract price was to be retained by Marine Development until the subcontract was completed.

Beginning with the loan against future progress payments by Marine Development to White-Ahlgren on December 2, 1953, in the amount of \$10,000.00, Marine Development paid to White-Ahlgren Trust Account No. 1, to and including September 3, 1954, the date of the last payment, the total sum of \$496,-882.55. From the original contract price of \$549,-138.20, there were deducted \$518.40, representing cost of a retaining wall deleted from the subcontract, and back charges by Marine Development in the amount of \$1,862.35, but there were added certain extras over and above the original contract price in the amount of \$4,374.28, making a total of \$551,131.73. Deducting the aforesaid total payments by Marine Development to White-Ahlgren of \$496,-882.55, left a [6] balance of \$54,249.18, which amount was paid by Marine Development to Plaintiff on December 17, 1954. Said latter amount was so paid by virtue of the provisions of the aforesaid Contract Bond, under which also Plaintiff had been required to pay to creditors of White-Ahlgren for labor and materials furnished to White-Ahlgren the approximate sum of \$119,188.17.

X.

White-Ahlgren filed with Defendant a delinquent withholding tax return for the fourth quarter of 1953, but filed timely withholding tax returns for the first, second and third quarters of 1954, after which no wage payments were made by White-Ahlgren, but did not pay the taxes shown thereon to be due from it. Prior to October 6, 1953, on which date Marine Development and White-Ahlgren entered into a subcontract for work at Camp Pendleton, California, as aforesaid, White-Ahlgren, under its prior name of Wright-Ahlgren Company, Inc., had made a contract with the Webb-Knapp Company of San Diego, California, providing for the installation of cement slabs, curbs, etc., in a housing project at San Diego, California, and work under that contract was in progress on December 2, 1953. It appeared that White-Ahlgren might be able to satisfy its tax liability for both withholding and social security taxes to the Federal Government under its said Marine Development subcontract out of profits from the said Webb-Knapp contract by the time tax returns for both the first and second quarters of 1954 were due to be filed by White-Ahlgren with the Defendant; also that White-Ahlgren might have available funds for the payment of its said taxes out of a claim then pending against Marine Development for certain cement slabs for the floors of garages required under the said subcontract, but eventually White-Ahlgren lost money on the said Webb-Knapp contract, and its said claim against Marine Development was disallowed.

XI.

On August 22, 1956, Defendant made assessments against White-Ahlgren and Plaintiff jointly of combined Withholding and Federal Insurance Contributions Act taxes and penalties for the fourth quarter of [7] 1953 and for the first, second, and third quarters of 1954, as follows:

Taxable Period	Amount Assessed
WT:FICA	T \$ 754.15
4Q53	P 188.54
WT:FICA	T 9,911.00
1Q54	P 2,477.75
WT:FICA	T 14,810.10
2Q54	P 3,702.53
WT:FICA	T = 4,759.19
$3\mathrm{Q}54$	P 1,189.80

XII.

Thereafter, Defendant issued three 10-day Notices and Demands, each dated August 27, 1956, for payment for the fourth quarter of 1953, and the second and third quarters of 1954, respectively, addressed to:

"White Ahlgren Co. & Century Indemnity Co., 7405 Alvarado Freeway, La Mesa, Calif.";

in each case for "Income tax withheld from wages and FICA taxes," as follows:

	4Q53	
Assessment	·	Balance Due
\$ 754.15		
P 188.54		\$ 942.69
		Int. 118.63
		\$ 1,061.32
	2Q54	
\$14,810.10		
P 3,702.53		\$18,512.63
		Int. 1,830.68
		\$20,343.31
	3Q54	. ,
\$ 4,759.19	·	
P 1,189.80		\$ 5,948.99
·		Int. 516.90
		\$ 6,465.89

Defendant also issued a 10-day Notice and Demand for payment, dated August 27, 1956, addressed as follows: [8]

"White-Ahlgren Co., Inc., Century Indemnity Co., c/o Walter T. Ahlgren, 7405 Alvarado Freeway, LaMesa, Calif.

"(Name added to assessment list per memo 9/27/56)"

for "Income tax withheld from wages and FICA taxes," as follows:

4	0	_	4
ч	W	5	4

As	ssessment		Balance Due
\$	9,911.00		
P	2,477.75		\$12,388.75
		Int.	1,375.45
			\$13 764 20

XIII.

Pursuant to the foregoing 10-day Notices and Demands for combined "Withholding and FICA taxes," and after segregating the amounts for withholding taxes alone, Plaintiff, under protest, paid to Defendant on November 12, 1957, the following withholding taxes, delinquency penalty, and interest to November 12, 1957:

		Delinquency	
Period	Tax	Penalty	Interest
4th Quarter, 1953\$	649.22	\$162.31	\$ 159.33
1st Quarter, 1954	6,977.35	*********	1,479.00
2nd Quarter, 1954	10,662.98	***********	2,100.31
3rd Quarter, 1954	3,403.85	•••••	619.41

XIV.

Plaintiff was not and never has been the "employer" of the employees of White-Ahlgren, the subcontractor, within the meaning of Section 1621(d) (1) of the 1939 Internal Revenue Code, or any other provision of law, and was not and never has been liable for withholding of tax on wages of employees of White-Ahlgren under the provisions of Section 1622 of the 1939 Internal Revenue Code, or any other provision of law. Accordingly, the withholding taxes herein sought to be recovered were not due from Plaintiff, and were therefore illegally assessed, demanded and collected from Plaintiff by Defend-

ant. Plaintiff, pursuant to the aforesaid Notices and Demands, has overpaid tax withheld in wages, including penalty and interest, for the 4th quarter of 1953, and the 1st, [9] 2nd and 3rd quarters of 1954, in the amount of \$26,213.76, which should be refunded.

XV.

Pursuant to the provisions of Section 322(b)(1) of the 1939 Internal Revenue Code, and/or Section 6511(a) of the 1954 Internal Revenue Code, Plaintiff filed with Defendant, within the period allowed by law, a proper claim for refund of said tax, penalty, and interest in the amount of \$26,213.76, assessed by Defendant and paid by Plaintiff as aforesaid. A true copy of said claim for refund is attached hereto, marked Exhibit "D," and incorporated herein by reference as if fully set forth herein. No action has been taken by Defendant, by the Commissioner of Internal Revenue, or by the Secretary or his delegate with respect to said claim, and no part of said tax, penalty, or interest alleged to have been illegally assessed and collected and thus overpaid has been refunded or credited to Plaintiff. More than six months' time has expired from the date of filing said claim. [10]

Second Cause of Action

I.

Plaintiff, The Century Indemnity Company, is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, duly qualified

to transact business in the State of California, and having its principal place of business and office in the State of California at 220 Bush Street, San Francisco, California, and a branch office at 548 South Spring Street, Los Angeles, California.

TT.

Defendant is now and at all times since the 26th day of November, 1952, has been the duly appointed, qualified and acting District Director of Internal Revenue for the Los Angeles District of California. Defendant is the person to whom the tax withheld on wages, together with a delinquency penalty, the tax under the Federal Insurance Contributions Act, and the tax under the Federal Unemployment Tax Act, together with interest thereon, the sums herein sought to be recovered, were paid, under protest, by the Plaintiff, as hereinafter set forth. At all times herein mentioned, Defendant was and still is a resident of the County of Los Angeles, State of California, and of said Southern District of California, Central Division.

III.

Jurisdiction of this Court exists under Title 28, United States Code, Section 1340, and under Section 3772(a)(2) of the 1939 Internal Revenue Code or Section 6532(a)(1) of the 1954 Internal Revenue Code, and Section 7422(a) of the 1954 Internal Revenue Code.

IV.

On October 6, 1953, the White-Ahlgren Company, Inc., hereinafter referred to as "White-Ahlgren,"

entered into a subcontract with Marine Development Company, Inc., hereinafter referred to as "Marine Development," to do and complete all Concrete Work as outlined in Section G, Concrete Work, and Section H, Concrete Curb, Concrete Sidewalks and Sidewalk Steps, in the Specifications and all plans pertaining [11] thereto for the 1,000 Unit Wherry Housing Projects, F.H.A. Projects 129-80007 and 129-80008, and Navy Projects N-09A, Section 1, and N-09A, Section 2, at Camp Pendleton, California. Work under the said subcontract did not, however, commence until on or about December 7, 1953. This subcontract, except for certain modifications as hereinafter set forth, continued in full force and effect until its completion by White-Ahlgren on or about September 17, 1954. A true and correct copy of said subcontract is attached hereto as Exhibit "A," and is incorporated herein by reference as if fully set forth herein.

V.

On or about October 6, 1953, White-Ahlgren made a written Application to Plaintiff for a Contract Bond and Agreement of Indemnity in the amount of White-Ahlgren's said subcontract with Marine Development, viz., \$549,138.20. A true and correct copy of said Application is attached hereto as Exhibit "B," and is incorporated herein by reference as if fully set forth herein. On or about December 2, 1953, a surety bond described as Contract Bond No. 291379 was executed by and on behalf of White-Ahlgren as Principal and The Century Indemnity

Company, Plaintiff herein, as Surety, and naming Marine Development as Owner, and Republic National Bank of Dallas, Texas, as Mortgagee, as required by the laws of the State of California as contained in Sections 1183, et seq., Code of Civil Procedure and all acts amendatory thereof, said bond to inure to the benefit of persons performing labor or furnishing materials, appliances, teams or power contributing to the work described in the aforesaid subcontract. A true and correct copy of said Contract Bond is attached hereto as Exhibit "C" and is incorporated herein by reference as if fully set forth herein.

VI.

On or about December 2, 1953, White-Ahlgren opened a commercial checking account in the Security Trust & Savings Bank of San Diego, California, known as White-Ahlgren Trust Account No. 1, for the purpose of receiving funds from Marine Development in payment for work [12] performed or to be performed under the aforesaid subcontract between White-Ahlgren and Marine Development, and from other sources, and to have such funds transferred from said Trust Account No. 1 from time to time to a general account which White-Ahlgren opened in the said bank on or about December 10, 1953. Checks to be drawn by White-Ahlgren against said Trust Account No. 1 for the payment of wages by White-Ahlgren to its employees under the aforesaid subcontract with Marine Development were subject to countersignature; that is, each check was sup-

posed to be signed by either Albert C. White or W. T. Ahlgren on behalf of White-Ahlgren, and by any one of several designated representatives of Plaintiff, who was to sign as Trustee. However, through error on the part of White-Ahlgren, the net wages of employees of White-Ahlgren were paid to them out of said Trust Account No. 1, on behalf of White-Ahlgren, on the signature of either W. T. Ahlgren or Albert C. White alone, and without any countersignature by any representative of Plaintiff, for each of the payrolls of White-Ahlgren for the periods ending December 14, 1953, to and including January 4, 1954. Also, during December, 1953, and the first and second quarters of 1954, certain transfers of funds were made from said Trust Account No. 1 to the general account of White-Ahlgren, both carried in the said Security Trust & Savings Bank of San Diego, to cover certain wage payments made by White-Ahlgren to its employees under the aforesaid subcontract. No such wage payment checks drawn on said general account of White-Ahlgren for the weekly payroll periods January 11, 1954, to March 8, 1954, or for any other periods, were required to be or were countersigned by any representative of Plaintiff. Beginning with the payroll period ended March 15, 1954, and ending with the completion of its subcontract on or about September 17, 1954, wage payments were made directly from the aforesaid Trust Account No. 1 to employees of White-Ahlgren on checks signed by either Albert C. White or W. T. Ahlgren and a representative of Plaintiff as Trustee. On or about May 28, 1954, a general account was opened by White-Ahlgren in a branch of said Security Trust & Savings Bank of San Diego, at [13] Carlsbad, California, with funds transferred thereto from said Trust Account No. 1, for the purpose of enabling White-Ahlgren to make termination wage payments to its employees working on the said subcontract with Marine Development at Camp Pendleton, California. Checks on the said Carlsbad general account were not required to be and were not countersigned by any representative of Plaintiff.

VII.

On December 2, 1953, at the request of White-Ahlgren, Marine Development made a loan to White-Ahlgren representing an advance of \$10,000.00 against future progress payments under the aforesaid subcontract, and that amount was deposited on the same day in the aforesaid Trust Account No. 1.

VIII.

During the month of March, 1954, it was agreed by and between Marine Development and White-Ahlgren that the latter was approximately 75 units behind the construction rate called for in the aforesaid subcontract. White-Ahlgren gave as the main reason for this delay the fact that it had insufficient working capital to proceed at the rate called for in the subcontract. On or about March 22, 1954, an agreement was reached between Marine Development and White-Ahlgren under which a less exacting performance schedule was set up for White-Ahlgren to complete its said subcontract, and in

addition Marine Development agreed to accelerate progress payments to White-Ahlgren so that they would be made weekly instead of monthly, as provided in said subcontract. It was further agreed that otherwise the said subcontract and the surety bond furnished by Plaintiff should remain in full force and effect, and they did until said subcontract was completed by White-Ahlgren on or about September 17, 1954, as aforesaid. Said subcontract was never cancelled.

IX.

Said subcontract provided that 10 per cent of the subcontract price was to be retained by Marine Development until the subcontract was completed. [14]

Beginning with the loan against future progress payments by Marine Development to White-Ahlgren on December 2, 1953, in the amount of \$10,000.00, Marine Development paid to White-Ahlgren Trust Account No. 1, to and including September 3, 1954, the date of the last payment, the total sum of \$496,-882.55. From the original contract price of \$549,-138.20, there were deducted \$518.40, representing cost of a retaining wall deleted from the subcontract, and back charges by Marine Development in the amount of \$1,862.35, but there were added certain extras over and above the original contract price in the amount of \$4,374.28, making a total of \$551,131.73. Deducting the aforesaid total payments by Marine Development to White-Ahlgren of \$496-882.55, left a balance of \$54,249.18, which amount was paid by Marine Development to Plaintiff on December 17, 1954. Said latter amount was so paid by

virtue of the provisions of the aforesaid Contract Bond, under which also Plaintiff had been required to pay to creditors of White-Ahlgren for labor and materials furnished to White-Ahlgren the approximate sum of \$119,188.17.

X.

White-Ahlgren filed with Defendant timely Federal Insurance Contributions Act tax returns for the fourth quarter of 1953 and for the first, second and third quarters of 1954, after which no wage payments were made by White-Ahlgren, but did not pay the taxes shown thereon to be due from it. Prior to October 6, 1953, on which date Marine Development and White-Ahlgren entered into a subcontract for work at Camp Pendleton, California, as aforesaid, White-Ahlgren, under its prior name of Wright-Ahlgren Company, Inc., had made a contract with the Webb-Knapp Company of San Diego, California, providing for the installation of cement slabs, curbs, etc., in a housing project at San Diego, California, and work under that contract was in progress on December 2, 1953. It appeared that White-Ahlgren might be able to satisfy its tax liability for both withholding and social security taxes to the Federal Government under its said Marine Development subcontract out of profits [15] from the said Webb-Knapp contract by the time tax returns for both the first and second quarters of 1954 were due to be filed by White-Ahlgren with the Defendant; also that White-Ahlgren might have available funds for the payment of its said taxes out of a claim

then pending against Marine Development for certain cement slabs for the floors of garages required under the said subcontract, but eventually White-Ahlgren lost money on the said Webb-Knapp contract, and its said claim against Marine Development was disallowed.

XI.

On August 22, 1956, Defendant made assessments against White-Ahlgren and Plaintiff jointly of combined Withholding and Federal Insurance Contributions Act taxes and penalties for the fourth quarter of 1953 and for the first, second and third quarters of 1954, as follows:

Taxable Period	Amount Assessed		
WT:FICA		\mathbf{T}	\$ 754.15
4Q53		P	188.54
WT:FICA		\mathbf{T}	9,911.00
1Q54		P	2,477.75
WT:FICA		\mathbf{T}	14,810.10
2Q54		P	3,702.53
WT:FICA		T	4,759.19
3Q54		P	1,189.80

XII.

Thereafter, Defendant issued three 10-Day Notices and Demands, each dated August 27, 1956, for payment for the fourth quarter of 1953, and the second and third quarters of 1954, respectively, addressed to:

"White-Ahlgren Co. & Century Indemnity Co., 7405 Alvarado Freeway, La Mesa, Calif.;"

in each case for "Income tax withheld from wages and FICA taxes," as follows:

Assessment	4Q5 3	Ba	lance Due
\$ 754.15 P 188.54		\$ Int.	942.69 118.63
\$14,810.10	2Q54	\$	1,061.32
P 3,702.53		\$1 Int.	18,512.63 1,830.68
ф4 750 10	3Q54	\$2	20,343.31
\$4,759.19 P 1,189.80		Int.	\$5,948.99 516.90
		-	\$6,465.89

Defendant also issued a 10-Day Notice and Demand for payment dated August 27, 1956, addressed as follows:

"White-Ahlgren Co., Inc., & Century Indemnity Co.

c/o Walter T. Ahlgren, 7405 Alvarado Freeway, La Mesa, Calif.

"(Name added to assessment list per memo 9/27/56)"

for "Income tax withheld from wages and FICA taxes," as follows:

	1Q54	
Assessment		Balance Due
\$9,911.00		
P 2,477.75		\$12,388.75
,		Int. 1,375.45
		\$13,764.20

XIII.

Pursuant to the foregoing 10-Day Notices and Demands for combined "Withholding and FICA taxes," and after segregating the amounts for Federal Insurance Contributions Act taxes alone, Plaintiff, under protest, paid to Defendant on November 12, 1957, the following FICA taxes, delinquency penalty, and interest to November 12, 1957:

		Delinquency	
Period	Tax	Penalty	Interest
4th Quarter, 1953	\$ 104.93	\$26.23	\$ 25.75
1st Quarter, 1954	2,933.65	*******	621.85
2nd Quarter, 1954	4,147.12	•••••	816.87
3rd Quarter, 1954	1,355.34	•••••	246.63

XIV.

Section 1410 of the 1939 Internal Revenue Code provides for the [17] payment of an excise tax by employers under the Federal Insurance Contributions Act, but imposes such tax only upon an employer "having individuals in his employ." Plaintiff did not have in its employ those persons actually employed by White-Ahlgren, who are the only "individuals" involved in this tax. Accordingly the Federal Insurance Contributions Act taxes herein sought to be recovered were not due from Plaintiff, and were therefore illegally assessed, demanded

and collected from Plaintiff by Defendant. Plaintiff, pursuant to the aforesaid Notices and Demands, has overpaid Federal Insurance Contributions Act taxes, including penalty and interest, for the 4th quarter of 1953, and the 1st, 2nd and 3rd quarters of 1954, in the amount of \$10,278.37, which should be refunded.

XV.

Pursuant to the provisions of Section 322(b)(1) of the 1939 Internal Revenue Code and/or Section 6511(a) of the 1954 Internal Revenue Code, Plaintiff, filed with Defendant, within the period allowed by law, a proper claim for refund of said tax, penalty, and interest in the amount of \$10,278.37, assessed by Defendant and paid by Plaintiff as aforesaid. A true copy of said claim for refund is attached hereto, marked Exhibit "E," and incorporated herein by reference as if fully set forth herein. No action has been taken by Defendant, by the Commissioner of Internal Revenue, or by the Secretary or his delegate with respect to said claim, and no part of said tax, penalty, or interest alleged to have been illegally assessed and collected and thus overpaid has been refunded or credited to Plaintiff. More than six months' time has expired from the date of filing said claim. [18]

Third Cause of Action

Τ.

Plaintiff, The Century Indemnity Company, is, and at all times herein mentioned was, a corporation

organized and existing under and by virtue of the laws of the State of Connecticut, duly qualified to transact business in the State of California, and having its principal place of business and office in the State of California at 220 Bush Street, San Francisco, California, and a branch office at 548 South Spring Street, Los Angeles, California.

II.

Defendant is now and at all times since the 26th day of November, 1952, has been the duly appointed, qualified and acting District Director of Internal Revenue for the Los Angeles District of California. Defendant is the person to whom the tax withheld on wages, together with a delinquency penalty, the tax under the Federal Insurance Contributions Act, and the tax under the Federal Unemployment Tax Act, together with interest thereon, the sums herein sought to be recovered, were paid, under protest, by the Plaintiff, as hereinafter set forth. At all times herein mentioned, defendant was and still is a resident of the County of Los Angeles, State of California, and of said Southern District of California, Central Division.

III.

Jurisdiction of this Court exists under Title 28, United States Code, Section 1340, and under Section 3772(a)(2) of the 1939 Internal Revenue Code or Section 6532(a)(1) of the 1954 Internal Revenue Code, and Section 7422(a) of the 1954 Internal Revenue Code.

IV.

On October 6, 1953, the White-Ahlgren Company, Inc., hereinafter referred to as "White-Ahlgren," entered into a subcontract with Marine Development, Inc., hereinafter referred to as "Marine Development," to do and complete all concrete work as outlined in Section G, Concrete Work, and Section H, Concrete Curb, Concrete Sidewalks and Sidewalk Steps, in the Specifications and all plans pertaining thereto for [19] the 1,000 Unit Wherry Housing Projects, F.H.A. Projects 129-80007 and 129-80008, and Navy Projects N-09A, Section 1, and N-09A, Section 2, at Camp Pendleton, California. Work under the said subcontract did not, however, commence until on or about December 7, 1953. This subcontract, except for certain modifications as hereinafter set forth, continued in full force and effect until its completion by White-Ahlgren on or about September 17, 1954. A true and correct copy of said subcontract is attached hereto as Exhibit "A," and is incorporated herein by reference as if fully set forth herein.

V.

On or about October 6, 1953, White-Ahlgren made a written Application to Plaintiff for a Contract Bond and Agreement of indemnity in the amount of White-Ahlgren's said subcontract with Marine Development, viz., \$549,138.20. A true and correct copy of said Application is attached hereto as Exhibit "B," and is incorporated herein by reference as if fully set forth herein. On or about December 2, 1953, a Surety Bond described as Contract Bond No.

291379 was executed by and on behalf of White-Ahlgren as Principal and The Century Indemnity Company, Plaintiff herein, as Surety, and naming Marine Development as Owner, and Republic National Bank of Dallas, Texas, as Mortgagee, as required by the laws of the State of California as contained in Sections 1183, et seq., Code of Civil Procedure, and all acts amendatory thereof, said bond to inure to the benefit of persons performing labor or furnishing materials, appliances, teams or power contributing to the work described in the aforesaid subcontract. A true and correct copy of said Contract Bond is attached hereto as Exhibit "C" and is incorporated herein by reference as if fully set forth herein.

VI.

On or about December 2, 1953, White-Ahlgren opened a commercial checking account in the Security Trust & Savings Bank of San Diego, California, known as White-Ahlgren Trust Account No. 1, for the purpose of receiving funds from Marine Development in payment for work performed [20] or to be performed under the aforesaid subcontract between White-Ahlgren and Marine Development, and from other sources, and to have such funds transferred from said Trust Account No. 1 from time to time to a general account which White-Ahlgren opened in the said Bank on or about December 10, 1953. Checks to be drawn by White-Ahlgren against said Trust Account No. 1 for the payment of wages by White-Ahlgren to its employees under the afore-

said subcontract with Marine Development were subject to countersignature; that is, each check was supposed to be signed by either Albert C. White or W. T. Ahlgren on behalf of White-Ahlgren, and by any one of several designated representatives of Plaintiff, who was to sign as Trustee. However, through error on the part of White-Ahlgren, the net wages of employees of White-Ahlgren were paid to them out of said Trust Account No. 1, on behalf of White-Ahlgren, on the signature of either W. T. Ahlgren or Albert C. White alone, and without any countersignature by any representative of Plaintiff, for each of the payrolls of White-Ahlgren for the periods ending December 14, 1953, to and including January 4, 1954. Also, during December, 1953, and the first and second quarters of 1954, certain transfers of funds were made from said Trust Account No. 1 to the general account of White-Ahlgren, both carried in the said Security Trust & Savings Bank of San Diego, California, to cover certain wage payments made by White-Ahlgren to its employees under the aforesaid subcontract. No such wage payments checks drawn on said general account of White-Ahlgren for the weekly payroll periods January 11, 1954, to March 8, 1954, or for any other periods, were required to be or were countersigned by any representative of Plaintiff. Beginning with the payroll period ended March 15, 1954, and ending with the completion of its subcontract on or about September 17, 1954, wage payments were made directly from the aforesaid Trust Account No. 1 to employees of White-Ahlgren on checks signed by either Albert C. White or W. T. Ahlgren and a representative of Plaintiff as Trustee. On or about May 28, 1954, a general account was opened by White-Ahlgren in a branch of said Security Trust & Savings Bank of San Diego, at Carlsbad, California, with [21] funds transferred thereto from said Trust Account No. 1, for the purpose of enabling White-Ahlgren to make termination wage payments to its employees working on the said subcontract with Marine Development at Camp Pendleton, California. Checks on the said Carlsbad general account were not required to be and were not countersigned by any representative of Plaintiff.

VII.

On December 2, 1953, at the request of White-Ahlgren, Marine Development made a loan to White-Ahlgren representing an advance of \$10,000.00 against future progress payments under the aforesaid subcontract, and that amount was deposited on the same day in the aforesaid Trust Account No. 1.

VIII.

During the month of March, 1954, it was agreed by and between Marine Development and White-Ahlgren that the latter was approximately 75 units behind the construction rate called for in the aforesaid subcontract. White-Ahlgren gave as the main reason for this delay the fact that it had insufficient working capital to proceed at the rate called for in the subcontract. On or about March 22, 1954, an agreement was reached between Marine Develop-

ment and White-Ahlgren under which a less exacting performance schedule was set up for White-Ahlgren to complete its said subcontract, and in addition Marine Development agreed to accelerate progress payments to White-Ahlgren so that they would be made weekly instead of monthly, as provided in said subcontract. It was further agreed that otherwise the said subcontract and the surety bond furnished by Plaintiff should remain in full force and effect, and they did until said subcontract was completed by White-Ahlgren on or about September 17, 1954, as aforesaid. Said subcontract was never cancelled.

TX.

Said subcontract provided that 10 per cent of the subcontract price was to be retained by Marine Development until the subcontract was [22] completed.

Beginning with the loan against future progress payments by Marine Development to White-Ahlgren on December 2, 1953, in the amount of \$10,000.00, Marine Development paid to White-Ahlgren Trust Account No. 1, to and including September 3, 1954, the date of the last payment, the total sum of \$496,882.55. From the original contract price of \$549,138.20, there were deducted \$518.40, representing cost of a retaining wall deleted from the subcontract, and back charges by Marine Development in the amount of \$1,862.35, but there were added certain extras over and above the original contract price in the amount of \$4,374.28, making a total

of \$551,131.73. Deducting the aforesaid total payments by Marine Development to White-Ahlgren of \$496,882.55, left a balance of \$54,249.18, which amount was paid by Marine Development to Plaintiff on December 17, 1954. Said latter amount was so paid by virtue of the provisions of the aforesaid Contract Bond, under which also Plaintiff had been required to pay to creditors of White-Ahlgren for labor and materials furnished to White-Ahlgren the approximate sum of \$119,188.17.

X.

White-Ahlgren filed with Defendant a timely Federal Unemployment Tax Act tax return for the calendar year 1954, but did not pay the tax shown thereon to be due from it, inasmuch as its aforesaid subcontract had been completed and it had no funds for the payment of such tax.

XI.

On August 22, 1956, Defendant made assessments against White-Ahlgren and Plaintiff jointly of Federal Unemployment Tax Act taxes for the year 1954, in the amount of \$3,524.84 and delinquency penalty of \$881.21.

XII.

Thereafter, on August 27, 1956, Defendant issued a 10-Day Notice and Demand for payment of said Federal Unemployment Tax Act taxes for the year 1954 of \$3,524.84, together with delinquency penalty of \$881.21, and interest of \$329.96, a total of \$4,736.01, addressed [23] as follows:

"White Ahlgren Co. Inc. c/o Walter T. Ahlgren, 7405 Alvarado Freeway, La Mesa, Calif., and Century Indemnity Co.

(Name added to assessment list per memo 9/27/56)"

XIII.

Pursuant to the aforesaid 10-Day Notice and Demand for payment of said Federal Unemployment Tax Act taxes, penalty, and interest for the year 1954, Plaintiff, under protest, paid to Defendant on November 12, 1957, the amount of \$4,113.39, made up of tax of \$3,524.84 and interest to date of payment of \$588.55. In the meantime the penalty had been removed by Defendant.

XIV.

Section 1600 of the 1939 Internal Revenue Code provides for the payment of an excise tax by employers under the Federal Unemployment Tax Act, but imposes such tax only upon an employer "as defined in Section 1607(a) having individuals in his employ * * *." Section 1607(a) defines the term "employer" to be one who has individuals in his employment "Who were employed by him." Inasmuch as Plaintiff did not have in its employ those persons actually employed by White-Ahlgren, who are the only "individuals" involved in this tax, the aforesaid sum of \$4,113.39 was not due from Plaintiff, and was therefore illegally assessed, demanded and collected from Plaintiff by Defendant, and should be refunded.

XV.

Pursuant to the provisions of Section 322(b)(1) of the 1939 Internal Revenue Code and/or Section 6511(a) of the 1954 Internal Revenue Code, Plaintiff filed with Defendant, within the period allowed by law, a proper claim for refund of said tax and interest in the amount of \$4,113.39, assessed by Defendant and paid by Plaintiff as aforesaid. A true copy of said claim for refund is attached hereto, marked Exhibit "F," and incorporated herein by reference as if fully set forth herein. No action has been taken by Defendant, by the Commissioner of Internal Revenue, or by the Secretary or his delegate with respect to said claim, and no part of [24] said tax or interest alleged to have been illegally assessed and collected and thus overpaid has been refunded or credited to Plaintiff. More than six months' time has expired from the date of filing said claim.

Wherefore, plaintiff prays judgment against Defendant:

- (a) For Withholding Tax on Wages, delinquency penalty, and interest, paid by Plaintiff to Defendant in the amount of \$26,213.76, plus interest as provided by law; and
- (b) For tax, delinquency penalty, and interest under the Federal Insurance Contributions Act, paid by Plaintiff to Defendant in the amount of \$10,278.37, plus interest as provided by law; and

- (c) For tax and interest under the Federal Unemployment Tax Act, paid by Plaintiff to Defendant in the amount \$4,113.39, plus interest as provided by law; and
- (d) For Plaintiff's costs and disbursements herein and such other relief as the Court may deem meet and proper.

/s/ ARTHUR H. DEIBERT,
Attorney for Plaintiff.

[Endorsed]: Filed October 7, 1958. [25]

[Title of District Court and Cause.]

ANSWER

Defendant, by its attorney, Laughlin E. Waters, United States Attorney for the Southern District of California, for its answer to plaintiff's complaint:

First

Denies each and every allegation of such complaint not admitted, qualified, or otherwise specifically referred to below.

Second

First Cause of Action

I.

Admits the allegations contained in paragraph 1 of plaintiff's complaint.

II.

Admits the allegations contained in paragraph 2 of plaintiff's complaint, but denies the validity of each and every ground upon which plaintiff bases the present suit for refund of taxes, and avers that plaintiff is not entitled to recover any sums paid for taxes. [71]

TIT.

Admits the allegations contained in paragraph 3 of plaintiff's complaint.

IV.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 4 of plaintiff's complaint.

V.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 5 of plaintiff's complaint.

VI.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 6 of plaintiff's complaint.

VII.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 7 of plaintiff's complaint.

VIII.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 8 of plaintiff's complaint.

TX.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 9 of plaintiff's complaint.

X.

Admits that White-Ahlgren filed with Defendant a delinquent withholding tax return for the fourth quarter of 1953, but denies that timely withholding tax returns were filed for the first, second and third quarters of 1954, and states that it is presently without sufficient information to form a belief as to the truth of the remaining allegations in the first [72] sentence of paragraph 10 of plaintiff's complaint. States that it is presently without sufficient information to form a belief as to the truth of the remaining allegations contained in paragraph 10 to plaintiff's complaint.

XI.

Admits the allegations contained in paragraph 11 of plaintiff's complaint.

XII.

Admits the allegations contained in paragraph 12 of plaintiff's complaint, but states that it is presently without sufficient information to form a belief as

to the truth of the allegations with respect to the manner in which said Notices and Demands were addressed.

XIII.

Admits the allegations contained in paragraph 13 of plaintiff's complaint.

XIV.

Denies each and every allegation contained in paragraph 14 of plaintiff's complaint.

XV.

Admits the allegations contained in paragraph 15 of plaintiff's complaint, but denies that assessment and collection of taxes from plaintiff was in any manner illegal, and further denies the validity of each and every ground upon which plaintiff's claim for refund is based, and except as herein otherwise specifically admitted, denies the truth of each and every allegation contained therein.

Second Cause of Action

I.

Admits the allegations contained in paragraph 1 of plaintiff's complaint.

II.

Admits the allegations contained in paragraph 2 of plaintiff's complaint, but denies the validity of each and every ground upon which [73] plaintiff bases the present suit for refund of taxes, and avers

that plaintiff is not entitled to recover any sums paid for taxes.

III.

Admits the allegations contained in paragraph 3 of plaintiff's complaint.

IV.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 4 of plaintiff's complaint.

V.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 5 of plaintiff's complaint.

VI.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 6 of plaintiff's complaint.

VII.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 7 of plaintiff's complaint.

VIII.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 8 of plaintiff's complaint.

IX.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 9 of plaintiff's complaint.

X.

Denies that White-Ahlgren filed timely Federal Insurance Contributions [74] Act tax returns for the fourth quarter of 1953 and for the first, second, and third quarters of 1954, and states that it is presently without sufficient information to form a belief as to the truth of the remaining allegations in the first sentence of paragraph 10 of plaintiff's complaint. States that it is presently without sufficient information to form a belief as to the truth of the remaining allegations contained in paragraph 10 of plaintiff's complaint.

XI.

Admits the allegations contained in paragraph 11 of plaintiff's complaint.

XII.

Admits the allegations contained in paragraph 12 of plaintiff's complaint, but states that it is presently without sufficient information to form a belief as to the truth of the allegations with respect to the manner in which said Notices and Demands were addressed.

XIII.

Admits the allegations contained in paragraph 13 of plaintiff's complaint.

XIV.

Denies each and every allegation contained in paragraph 14 of plaintiff's complaint.

XV.

Admits the allegations contained in paragraph 15 of plaintiff's complaint, but denies that assessment and collection of taxes from plaintiff was in any manner illegal, and further denies the validity of each and every ground upon which plaintiff's claim for refund is based, and except as herein otherwise specifically admitted, denies the truth of each and every allegation contained therein.

Third Cause of Action

I.

Admits the allegations contained in paragraph 1 of plaintiff's complaint. [75]

II.

Admits the allegations contained in paragraph 2 of plaintiff's complaint, but denies the validity of each and every ground upon which plaintiff bases the present suit for refund of taxes, and avers that plaintiff is not entitled to recover any sums paid for taxes.

III.

Admits the allegations contained in paragraph 3 of plaintiff's complaint.

IV.

States that it is presently without sufficient knowledge to form a belief as to the truth of the

allegations contained in paragraph 4 of plaintiff's complaint.

V.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 5 of plaintiff's complaint.

VI.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 6 of plaintiff's complaint.

VII.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 7 of plaintiff's complaint.

VIII.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 8 of plaintiff's complaint.

TX.

States that it is presently without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 9 of plaintiff's complaint. [76]

X.

Defendant admits that White-Ahlgren filed a Federal Unemployment Tax Act tax return for the calendar year 1954, and did not pay the tax shown thereon to be due from it, but denies that such re-

turn was filed timely, and further states that it is presently without sufficient knowledge to form a belief as to the truth of the allegations with respect to the reasons for such non-payment.

XI.

Admits the allegations contained in paragraph 11 of plaintiff's complaint.

XII.

Admits the allegations contained in paragraph 12 of plaintiff's complaint, but states that it is presently without sufficient information to form a belief as to the truth of the allegations with respect to the manner in which said Notice and Demand was addressed.

XIII.

States that it is presently without sufficient information to form a belief as to the truth of the allegations contained in the first sentence of paragraph 13 of plaintiff's complaint. Admits the allegations contained in the second sentence of paragraph 13 of plaintiff's complaint.

XIV.

Denies each and every allegation contained in paragraph 14 of plaintiff's complaint.

XV.

Admits the allegations contained in paragraph 15 of plaintiff's complaint, but denies that assessment and collection of taxes from plaintiffs was in any

manner illegal, and further denies the validity of each and every ground upon which plaintiff's claim for refund is based, and except as herein otherwise specifically admitted, denies the truth of each and every allegation contained therein. [77]

Wherefore, having fully answered, defendant prays that judgment be rendered in its favor, that defendant be awarded its costs, and that plaintiff take nothing by this action.

LAUGHLIN E. WATERS, United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN, Assistant U. S. Attorney,

/s/ EUGENE N. SHERMAN,
Attorneys for Defendant.

Certificate of service by mail attached.

[Endorsed]: Filed December 8, 1958. [78]

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE ORDER

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, It Is Ordered:

I. This is an action for:

The refund of (a) Withholding taxes, (b) Federal Insurance Contributions Act taxes, and (c) Federal Unemployment Act taxes paid under protest by Plaintiff to Defendant on November 12, 1957, in the aggregate [130] amount of \$40,607.02. The parties are shown above. The pleadings which raise the issues herein consist of a Complaint filed October 7, 1958, by Plaintiff, and an Answer filed December 8, 1958, by Defendant.

Federal jurisdiction exists under Section II. 1340 of Title 28, United States Code, which provides that the District Courts of the United States shall have original jurisdiction of any civil action arising under any Act of Congress providing for Internal Revenue, and the present action does so arise. Section 3772(a)(2) of the Internal Revenue Code of 1939 and Section 6532(a)(1) of the Internal Revenue Code of 1954, which are essentially identical, together with Section 7422(a) of the Internal Revenue Code of 1954, provide for suits for refund of taxes, penalties, and interest alleged to have been illegally collected, and provide also that no such suit or proceeding, after a claim for refund has been filed, shall be begun before the expiration of six months from the date of filing such claims unless the Commissioner of Internal Revenue renders a decision thereon within such time, nor after the expiration of two years from the date of mailing by the Commissioner to the taxpayer of a notice of disallowance of the part of the claim to which the

suit relates. A proper separate claim for refund for each of the three types of taxes above enumerated was timely filed by Plaintiff with Defendant on January 27, 1958, but no action thereon had been taken by the Commissioner of Internal Revenue within six months of the date of filing each such claim. After the expiration of said six months' period, Plaintiff thereupon on October 7, 1958, filed this suit for refund of each of the three types of taxes herein described in paragraph I.

III. The following facts are admitted, and require no proof:

- (A) (1) Plaintiff at all times mentioned was and is a corporation organized and existing under the laws of Connecticut, duly qualified to do business in California, having its principal place of business and office in California in San Francisco, and a branch office in Los Angeles.
- (2) Defendant is now and since November 26, 1952, has been the duly appointed, qualified and acting District Director of Internal Revenue for the Los Angeles District of California. Defendant is the person to whom [131] all of the taxes, penalty, and interest involved herein were paid under protest by Plaintiff. Defendant at all times herein mentioned was and is a resident of the County of Los Angeles and of the Southern District of California, Central Division.
- (3) On October 6, 1953, White-Ahlgren Company, Inc., hereinafter referred to as "White-Ahl-

gren," entered into a subcontract with Marine Development, Inc., hereinafter referred to as "Marine Development," to do and complete all concrete work as specified for 1,000 Unit Wherry Housing Projects at Camp Pendleton, California. Work under the said subcontract commenced on or about December 7, 1953.

- (4) On or about October 6, 1953, White-Ahlgren made a written Application to Plaintiff for a Contract Bond and Agreement of Indemnity in the amount of White-Ahlgren's said subcontract with Marine Development, viz., \$549,138.20.
- (5) On or about December 2, 1953, a Surety Bond described as Contract Bond No. 291379, was executed in the said amount of \$549,138.20 by and on behalf of White-Ahlgren as Principal, The Century Indemnity Company, Plaintiff, as Surety, Marine Development, as Owner, and Republic National Bank of Dallas, Texas, as Mortgagee.
- (6) On or about December 2, 1953, White-Ahlgren opened a Commercial checking account in the Security Trust and Savings Bank of San Diego, California, known as White-Ahlgren Trust Account No. 1. Checks drawn against said Trust Account No. 1 and signed by either Albert C. White or W. T. Ahlgren on behalf of White-Ahlgren were also to be signed by any one of several designated representatives of Plaintiff who was to sign as Trustee. On a signature card of the Security Trust and Savings Bank of San Diego, California, dated Decemings Bank of San Diego, California, dated Decemings

ber 2, 1953, Plaintiff's Exhibit 4(a), Eva L. Cole and Frank D. Cole were designated as signatories for Plaintiff. On another signature card of said bank, also dated December 2, 1953, [132] Plaintiff's Exhibit 4(b), Eva L. Cole, Frank D. Cole or D. J. Waite were designated as signatories for Plaintiff. The latter said signature card was superseded by another signature card of said bank, dated April 19, 1954, Plaintiff's Exhibit 4(c), in which Eva L. Cole, Robert H. Easton and Burton A. Van Tassel were named as trustee signatories for Plaintiff. Another signature card in said bank, dated June 11, 1954, Plaintiff's Exhibit 4(d), naming Burton A. Van Tassel, D. J. Waite or Eva L. Cole as trustee signatories, was substituted for Plaintiff's Exhibit 4(c). Beginning with the weekly payroll period ended March 15, 1954, and ending with the completion of its subcontract on or about September 17, 1954, wage payments were made directly from the aforesaid Trust Account No. 1 to employees shown on White-Ahlgren's payrolls on checks signed by either Albert C. White or W. T. Ahlgren and countersigned by a representative of Plaintiff as Trustee. On or about May 28, 1954, a general account was opened by White-Ahlgren in a branch of said Security Trust and Savings Bank of San Diego, at Carlsbad, California, with funds transferred thereto from said Trust Account No. 1, to enable White-Ahlgren to make termination wage payments to its employees working on the said subcontract with Marine Development at Camp Pendleton, California. The authorized signatories on said account were W. T. Ahlgren, Albert C. White, and D. J. Waite, any two of whom were authorized to sign checks on said account. When the subcontract was completed all remaining funds in the Carlsbad account were retransferred to White-Ahlgren Trust Account No. 1 in the aforesaid San Diego Bank.

- (7) Weekly payrolls for the employees of White-Ahlgren were made up by the latter's bookkeeper in the following manner: A time card for each employee was prepared by the foreman for White-Ahlgren and presented to the bookkeeper for computation. A recap of the total payroll was then prepared by the latter showing each employee's name, hours worked, rate of pay, gross amount due, total tax deductions, and [133] net amount due, and a copy of said payroll recap was furnished to the representative of Plaintiff before such net amounts were paid to the individual employees.
- (8) On December 2, 1953, Marine Development made a loan to White-Ahlgren representing an advance of \$10,000.00 against future progress payments under the aforesaid subcontract, and that amount was deposited on the same date in the aforesaid Trust Account No. 1 in the aforesaid San Diego Bank.
- (9) Beginning with the loan against future progress payments by Marine Development to White-Ahlgren on December 2, 1953, in the amount of \$10,000.00, Marine Development paid to White-

Ahlgren Trust Account No. 1 or to White-Ahlgren Company, Inc., to and including September 3, 1954, the date of the last payment, the total sum of \$496,-882.55. From the original contract price of \$549,-138.20, there were deducted \$518.40, representing cost of a retaining wall deleted from the subcontract, and back charges by Marine Development against White-Ahlgren in the amount of \$1,862.35, but there were added certain extras over and above the original contract price in the amount \$4,374.28, making a total of \$551,131.73. Deducting the aforesaid total payments by Marine Development to White-Ahlgren of \$496,882.55, left a balance of \$54,249.18, which amount was paid by Marine Development to Plaintiff on December 17, 1954. Simultaneous with the payment of \$54,249.18 to Plaintiff by Marine Development, Plaintiff executed and delivered to Marine Development an "Agreement of Release and Indemnity," Defendant's Exhibit F. Prior thereto a levy was served on December 3, 1954, on Marine Development by Defendant for unpaid Internal Revenue taxes of Wright-Ahlgren Company (i.e., White-Ahlgren Company) in the amount of \$12,718.11. Plaintiff paid to creditors of White-Ahlgren for labor and materials furnished to White-Ahlgren the approximate sum of \$119,188.17. Between November, 1954, and the present date, Plaintiff made recoveries in connection with claims asserted under the said Surety Bond in the total amount of \$70,723.64, Plaintiff's Exhibit 20. [134]

- (10) Plaintiff never paid any of its own funds to White-Ahlgren for payroll purposes, with the exception of \$1,090.00, in September, 1954, paid to White-Ahlgren Trust Account No. 1 to enable White-Ahlgren to meet in full its final payroll upon completion of said subcontract.
- (11) An Employer's Quarterly Federal Tax Return covering both Withholding taxes and Federal Insurance Contributions Act taxes for the fourth quarter of 1953, was filed by White-Ahlgren with Defendant on July 6, 1956, and was therefore delinquent. It was not accompanied by payment of the tax.
- (12) Prior to October 6, 1953, on which date Marine Development and White-Ahlgren entered into the aforesaid subcontract for work at Camp Pendleton, California, Wright-Ahlgren Company, Inc., had made a contract with the Webb-Knapp Company at San Diego, California, providing for the installation of cement slabs, curbs, etc., in a housing project at San Diego, and work under that contract was still in progress on December 2, 1953.
- (13) On August 31, 1953, the name of Wright-Ahlgren Company, Inc., a Nevada corporation, was changed to White-Ahlgren Company, Inc.
- (14) On or about February 19, 1954, White-Ahlgren did pay to Defendant, by check drawn on said Trust Account No. 1 and countersigned by Eva L. Cole, Trustee, the sum of \$10,397.71, repre-

senting Federal Withholding and Employment taxes due from Wright-Ahlgren Company, Inc., for the 3rd Quarter of 1953, Defendant's Exhibit J.

(15) On August 22, 1956, Defendant made assessments against White-Ahlgren and Plaintiff jointly of combined Withholding and Federal Insurance Contributions Act taxes and delinquency penalties for the fourth quarter of 1953 and for the first, second and third quarters of 1954, as follows: [135]

Taxable Period	Amount Assessed	
WT:FICA	T \$ 754.15	
4Q53	P 188.54	
WT:FICA	T 9,911.00	
1Q54	P 2,477.75	
WT:FICA	T 14,810.10	
2Q54	P 3,702.53	
WT:FICA	T 4,759.19	
3Q54	P 1,189.80	

(16) Thereafter, Defendant issued three 10-day Notices and Demands, each dated August 27, 1956, for payment for the fourth quarter of 1953, and the second and third quarters of 1954, respectively, addressed to:

"White Ahlgren Co. & Century Indemnity Co., 7405 Alvarado Freeway, La Mesa, Calif."

in each case for "Income tax withheld from wages and FICA taxes," as follows:

		4Q53	
As	ssessment		Balance Due
	\$ 754.15		\$ 942.69
P	188.54		Int 118.63
			\$1,061.32
		2Q54	
	\$14,810.10		\$18,512.63
P	3,702.53		Int 1,830.68
			\$20,343.31
		3Q54	
	\$4,759.19		\$5,948.99
P	1,189.80		Int. 516.90
			\$6,465.89

Defendant also issued a 10-day Notice and Demand for payment, dated August 27, 1956, addressed as follows:

"White Ahlgren Co., Inc., c/o Walter T. Ahlgren, 7405 Alvarado Freeway, La Mesa, Calif., and Century Indemnity Co.

(Name added to assessment list per memo 9/27/56)"

for "Income tax withheld from wages and FICA taxes," as follows:

	1494		
Assessment		Ba	lance Due
\$9,911.00		5	\$12,388.75
P 2,477.75		Int	1,375.45
		_	
		\$	\$13,764.20

Pursuant to the foregoing 10-day Notices and Demands for combined "Withholding and FICA taxes," and after segregating the amounts for with-

holding taxes alone, Plaintiff, under protest, paid to Defendant on November 12, 1957, the following withholding taxes, one delinquency penalty, the other delinquency penalties having been abated by Defendant, and interest to November 12, 1957:

		Delinquency	
Period	Tax	Penalty	Interest
4th Quarter, 1953\$	649.22	\$162.31	\$ 159.33
1st Quarter, 1954	6,977.35		1,479.00
2nd Quarter, 1954	10,662.98		2,100.31
3rd Quarter, 1954	3,403.85	•••••	619.41

- (17) Pursuant to the provisions of Section 322(b)(1) of the 1939 Internal Revenue Code and/or Section 6511(a) of the 1954 Internal Revenue Code, Plaintiff filed with Defendant, within the period allowed by law, a timely and proper claim for refund of said tax, penalty, and interest in the amount of \$26,213.76 assessed by Defendant and paid by Plaintiff as aforesaid. A true copy of said claim for refund was attached to Plaintiff's Complaint herein marked Exhibit "D." Defendant denies that assessment and collection of taxes from Plaintiff was in any manner illegal, and further denies the validity of each and every ground upon which Plaintiff's claim for refund is based, and except as herein otherwise specifically admitted, denies the truth of each and every allegation contained therein.
- (18) Pursuant to the foregoing 10-Day Notices and Demands for combined "Withholding and FICA taxes," and after segregating the amounts

for Federal Insurance Contributions Act taxes alone, Plaintiff, under protest, paid to Defendant on November 12, 1957, the following FICA taxes, one delinquency penalty, the other delinquency penalties having been eliminated by Defendant, and interest to November 12, 1957: [137]

	Delinquen	ey
Period Tax	r Penalty	Interest
4th Quarter, 1953\$ 104.	93 \$26.23	\$ 25.75
1st Quarter, 1954 2,933.	65	621.85
2nd Quarter, 1954 4,147.	12	816.87
3rd Quarter, 1954 1,355.	34	246.63

- (19) Pursuant to the provisions of Section 322(b)(1) of the 1939 Internal Revenue Code and/or Section 6511(a) of the 1954 Internal Revenue Code, Plaintiff filed with Defendant, within the period allowed by law, a timely and proper claim for refund of said tax, penalty, and interest in the amount of \$10,278.37 assessed by Defendant and paid by Plaintiff as aforesaid. A true copy of said claim for refund was attached to Plaintiff's Complaint herein marked Exhibit "E." Defendant denies that assessment and collection of taxes from Plaintiff was in any manner illegal, and further denies the validity of each and every ground upon which Plaintiff's claim for refund is based, and except as herein otherwise specifically admitted, denies the truth of each and every allegation contained therein.
- (20) On August 22, 1956, Defendant made assessments against White-Ahlgren and Plaintiff

jointly of Federal Unemployment Tax Act taxes for the year 1954, in the amount of \$3,524.84, and delinquency penalty of \$881.21.

(21) Thereafter, on August 27, 1956, Defendant issued a 10-Day Notice and Demand for payment of said Federal Unemployment Tax Act taxes for the year 1954 of \$3,524.84, together with delinquency penalty of \$881.21, and interest of \$329.96, a total of \$4,736.01, addressed as follows:

"White Ahlgren Co., Inc., c/o Walter T. Ahlgren, 7405 Alvarado Freeway, La Mesa, Calif., and Century Indemnity Co.

(Name added to assessment list per memo 9/27/56)"

- (22) Pursuant to the aforesaid 10-Day Notice and Demand for payment of said Federal Unemployment Tax Act taxes, delinquency penalty and interest for the year 1954, Plaintiff, under protest, paid to [138] Defendant on November 12, 1957, the amount of \$4,113.39, made up of tax of \$3,524.84 and interest to date of payment of \$588.55. In the meantime the penalty had been abated by Defendant.
- (23) Pursuant to the provisions of Section 322(b)(1) of the 1939 Internal Revenue Code and/or Section 6511(a) of the 1954 Internal Revenue Code, Plaintiff filed with Defendant, within the period allowed by law, a timely and proper claim for refund of said tax and interest in the amount

of \$4,113.39 assessed by Defendant and paid by Plaintiff as aforesaid. A true copy of said claim for refund was attached to Plaintiff's Complaint herein marked Exhibit "F." Defendant denies that assessment and collection of taxes from Plaintiff was in any manner illegal, and further denies the validity of each and every ground upon which Plaintiff's claim for refund is based, and except as herein otherwise specifically admitted, denies the truth of each and every allegation contained therein.

(24) No action has been taken by Defendant, by the Commissioner of Internal Revenue, or by the Secretary of the Treasury or his delegate, with respect to any of the three aforesaid Claims for Refund of Withholding taxes, Federal Insurance Contributions Act taxes, or Federal Unemployment Act taxes, respectively, and no part of any of the said taxes, delinquency penalty, or interest has been refunded or credited to Plaintiff. More than six months' time had expired from the respective dates of filing said three Claims for Refund before the date of filing of the Complaint herein in this Court.

IV. None.

V. None.

VI. The only issue of fact remaining to be litigated upon the Trial is whether or not, for purposes of the Withholding, Federal Insurance Contributions Act taxes, and Federal Unemployment Act taxes, Plaintiff was the employer of the employees of White-Ahlgren during the periods involved

herein. Plaintiff contends that this is a mixed question of fact and law.

VII. The Exhibits to be offered at the Trial, together with a [139] statement of all admissions by and issues between the parties with respect thereto, are as follows:

(A) Plaintiff's Exhibits—

- (1) Exhibit 1—Copy of subcontract between Marine Development, Inc., and White-Ahlgren Company, Inc., dated October 6, 1953.
- (2) Exhibit 2—Copy of Application by White-Ahlgren Company, Inc., to Plaintiff for Contract Bond and Agreement of Indemnity, dated October 6, 1953.
- (3) Exhibit 3—Copy of Contract Bond No. 291379 between White-Ahlgren Company, Inc., as Principal, and Plaintiff as Surety, executed December 2, 1953.
- (4) Exhibit 4—Copy of four Signature Cards of the Security Trust & Savings Bank of San Diego, California, authorizing withdrawals of funds from White-Ahlgren Trust Account No. 1 in said Bank.
 - (a) Signature Card A dated 12/2/53.
 - (b) Signature Card B dated 12/2/53.
 - (c) Signature Card C dated 4/19/54.
 - (d) Signature Card D dated June 11, 1954.
- (5) Exhibit 5—Copy of Signature Card of the Security Trust & Savings Bank of San Diego, Cali-

fornia, authorizing withdrawals of funds from the White-Ahlgren Company, Inc., Account in said Bank.

- (6) Exhibit 6—Copy of 30 voucher checks of Marine Development, Inc., payable to the order of White-Ahlgren Trust Account No. 1, and/or White-Ahlgren Company, Inc., aggregating \$496,882.55.
- (7) Exhibit 7—Copy of Resolution of Board of Directors of White-Ahlgren Company, Inc., dated December 8, 1953, signed by Irene Higgins, Secretary for White-Ahlgren Company, Inc.
- (8) Exhibit 8—Copy of Schedule of Progress payments by Marine Development, Inc., to White-Ahlgren Company, Inc., from December 2, 1953, to December 17, 1954, including final retention payments to Plaintiff. [140]
- (9) Exhibit 9—Recapitulation showing amount of subcontract, dated October 6, 1953, between Marine Development, Inc., and White-Ahlgren Company, Inc., with decrease and increases in contract price, amount paid to White-Ahlgren Company, Inc., and retention payment by Marine Development to Plaintiff.
- (10) Exhibit 10—Copy of letter of March 23, 1954, from Robert A. Oakes of Oakes & Horton, Bank of America Building, San Diego 1, California, Attorneys for Marine Development, Inc., addressed to Miss Eva L. Cole, Los Angeles, California, modi-

fying the subcontract of October 6, 1953, Plaintiff's Exhibit 1.

- (11) Exhibit 11—Copy of Certificate by Secretary of State of Nevada, dated May 14, 1957, of Amendment of Articles of Incorporation of Wright-Ahlgren Company, Inc., changing name to White-Ahlgren Company, Inc., as of August 31, 1953.
- (12) Exhibit 12—Copy of three Ten-Day Notices and Demands, issued by Defendant, each dated August 27, 1956, for payment of "Income tax withheld from wages and FICA taxes," and addressed to:
 - "White-Ahlgren Co., Inc. & The Century Indemnity Co., 7405 Alvarado Freeway, La Mesa, Calif."
- (13) Exhibit 13—Copy of Ten-day Notice and Demand issued by Defendant, dated August 27, 1956, for payment of "Income tax withheld from wages and FICA taxes," for the 1st Quarter of 1954, addressed to:
 - "White-Ahlgren Co. c/o W. T. Ahlgren, 7405 Alvarado Freeway, La Mesa, Calif., and Century Indemnity Co., Special Procedure.

(Name added to assessment list per memo. 9/27/59)."

(14) Exhibit 14—Copy of Ten-Day Notice and Demand issued by Defendant, dated August 27, 1956, for payment of FUTA tax, for the year 1954, addressed to:

"White-Ahlgren Co. c/o Walter T. Ahlgren, 7405 Alvarado Freeway, La Mesa, Calif., and Century Indemnity Co., Special Procedure.

(Name added to assessment list per memo. 9/27/56)" [141]

- (15) Exhibit 15—Copy of letter dated November 12, 1957, from office of District Director of Internal Revenue at Los Angeles, addressed to Arthur H. Deibert, Counsel for Plaintiff.
- (16) Exhibit 16—Copy of letter dated November 21, 1957, from office of District Director of Internal Revenue at Los Angeles, addressed to Arthur H. Deibert, Counsel for Plaintiff.
- (17) Exhibit 17—Copy of Claim for Refund of Withholding taxes filed by Plaintiff with Defendant on or about January 27, 1958, which taxes were paid by Plaintiff to Defendant on November 12, 1957.
- (18) Exhibit 18—Copy of Claim for Refund of Federal Insurance Contributions Act taxes filed by Plaintiff with Defendant on or about January 27, 1958, which taxes were paid by Plaintiff to Defendant on November 12, 1957.
- (19) Exhibit 19—Copy of Claim for Refund of Federal Unemployment Tax filed by Plaintiff with Defendant on January 27, 1958, which tax was paid to Defendant on November 12, 1957.
- (20) Exhibit 20—Copy of Schedule of bills of White-Ahlgren Company, Inc., for materials, etc., paid by Plaintiff in the total amount of \$119,118.17.

- (21) Exhibit 21—Copy of Affidavit of George T. Holbrook, Secretary of Plaintiff, showing recoveries received by Plaintiff to date thereof, in the amount of \$64,223.64.
- (22) Exhibit 22—Report on Payroll Tax Liabilities of White-Ahlgren Company, Inc., for 4th Quarter of 1953, and 1st, 2nd and 3rd Quarters of 1954, by Charles I. Corp, Certified Public Accountant.
- (23) Exhibit 23—Stipulation as to Facts, pp. 14 to 20, inclusive, and Exhibit "C," pp. 22 and 23 of Transcript of Record in Fireman's Fund Indemnity Company, Appellant, v. United States of America, Appellee, United States Court of Appeals for the Ninth Circuit, No. 13341.
- (24) Exhibit 24—Subordination Agreement, dated December 2, 1953, between White-Ahlgren Company, Inc., Contractor, Heartha A. Clausen, Creditor, and Plaintiff, Surety. [142]
- (25) Exhibit 25—Letter dated January 15, 1954, from Eva L. Cole, Trustee for Plaintiff, to Security-First National Bank of San Diego, Attention Mr. Frazier, Vice President.
- (26) Exhibit 26—Copy of draft dated 11/12/57 by Burton A. Van Tassel, Attorney for Plaintiff, payable to Internal Revenue Service in the amount of \$40,607.02 in payment of taxes involved herein.
 - (B) Defendant's Exhibits are as follows:

- (1) Exhibit A—Copy of letter dated November 16, 1953, from D. J. Waite, Attorney in Fact for Century Indemnity Company to Marine Development, Inc.
- (2) Exhibit B—Copy of Instruction to Security Trust and Savings Bank of San Diego re White-Ahlgren Trust Account No. 1, dated December 2, 1953, and bearing the signatures of W. T. Ahlgren, Eva L. Cole, D. J. Waite, Frank D. Cole, Irene Higgins and M. Frazier.
- (3) Exhibit C—Copy of Power of Attorney appointing Eva L. Cole and others as Attorneys in Fact for Century Indemnity Company executed by J. G. Hasselbrack on March 11, 1952, on behalf of Century Indemnity Company.
- (4) Exhibit D—Copies of account ledgers of Security Trust and Savings Bank of San Diego re White-Ahlgren Trust Account No. 1 for the period December 7, 1953, through December 6, 1954.
- (5) Exhibit E—Copies of account ledgers of Security Trust and Savings Bank of San Diego re White-Ahlgren Company, Inc., account for the period December 10, 1953, through August 24, 1956.
- (6) Exhibit F—Copy of Agreement of Release and Indemnity, dated December 17, 1954, and signed by Burton A. Van Tassel, Attorney in Fact, on behalf of Century Indemnity Company.
- (7) Exhibit G—Copy of letter dated July 2, 1954, from Burton A. Van Tassel on behalf of Century Indemnity Company to Marine Development, Inc.

- (8) Exhibit H—Copy of check No. 2468 dated December 17, 1954, drawn on the Republic National Bank of Dallas, Texas, by Marine [143] Development, Inc., and made payable to the order of Century Indemnity Company in the amount of \$54,249.18.
- (9) Exhibit I—Deposition of Martin E. Frazier taken at San Diego, California, on July 14, 1959.
- (10) Exhibit J—Copy of check No. 2469507 dated February 17, 1954, drawn on White-Ahlgren Trust Account No. 1, signed by Albert C. White and contersigned by Eva L. Cole, Trustee, and made payable to Director of Internal Revenue in the amount of \$10,397.71.

Plaintiff admits the authenticity and due execution of each of Defendant's exhibits (except as hereinafter otherwise set forth) but reserves the right to object to the introduction of any of said exhibits on the grounds of irrelevancy, immateriality, and/or incompetency.

Defendant admits the authenticity and due execution of each of Plaintiff's exhibits (except as hereinafter set forth) but reserves the right to object to the introduction of any of said exhibits on the grounds of irrelevancy, immateriality, and/or incompetency. Defendant does not admit the authenticity and due execution of Plaintiff's Exhibits 7, 9, 22, and 23, and reserves the right to object to said exhibits on said grounds in addition to the grounds hereinabove set forth.

VIII. Plaintiff contends that the only issue of law remaining to be litigated upon the Trial is as stated in paragraph VI herein, and that such issue is a mixed question of fact and law. Defendant contends that the issue of fact hereinbefore set forth in paragraph VI is the only issue remaining to be litigated in this case and that there are no issues of law remaining to be litigated herein.

IX. The foregoing Admissions have been made by the parties, and the parties having specified the foregoing issue remaining to be litigated, this order shall supplement the pleadings and govern the trial of this cause, unless modified to prevent manifest injustice. Nothing [144] contained herein shall be deemed to preclude the parties from filing a supplemental order in order to shorten the time of trial.

Dated: October 5, 1959.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to form and content.

/s/ ARTHUR H. DEIBERT,

/s/ BURTON A. VAN TASSEL, Attorneys for Plaintiff.

/s/ EUGENE N. SHERMAN,
Attorney for Defendant.

[Endorsed]: Filed October 5, 1959. [145]

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL PRE-TRIAL CONFERENCE ORDER

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, on October 5, 1959, when the proposed original Pre-Trial Conference Order was filed, and an adjournment of said hearing to November 30, 1959, at which time this case was set for trial at 10:00 a.m., February 8, 1960, and subsequently continued to September 13, 1960, It Is Further Ordered: [158]

That, unless otherwise herein provided, the terms and conditions of said original Pre-Trial Conference Order shall apply likewise to this Amended and Supplemental Pre-Trial Conference Order.

That there shall be added by way of amendment and supplement under Paragraph III-A, as facts which are admitted and require no proof, the following:

- (25) Paragraph III-A(7), page 4, is amended and supplemented at line 32 by inserting after "rate of pay" the following: "(where the employee worked at an hourly rate of pay)."
- (26) Paragraph III-A(9), lines 9 through 13 are amended and supplemented to read as follows:
 - (9) Beginning with the loan against future progress payments by Marine Development to

White-Ahlgren on December 2, 1953, in the amount of \$10,000.00, Marine Development paid, by checks made payable to White-Ahlgren Trust Account No. 1 or to White-Ahlgren Company, Inc., to and including September 3, 1954, the date of the last payment, the total sum of \$496,882.55. All of said checks were deposited directly into the White-Ahlgren Trust Account No. 1.

(27) The last sentence of Paragraph III-A(9), lines 29 through 32, page 5, is amended to read as follows:

Plaintiff made recoveries in connection with claims asserted under the said Surety Bond in the total amount of \$70,723.64.

(28) Paragraph III-A(12) is amended and supplemented as follows:

Prior to October 6, 1953, on which date Marine Development and White-Ahlgren entered into the aforesaid subcontract for work at Camp Pendleton, California, Wright-Ahlgren Company, Inc. (which was renamed White-Ahlgren Company, Inc., on [159] August 31, 1953) had made a contract with Crevette Construction Company, a subsidiary of Webb-Knapp Company, at San Diego, California, providing for the installation of cement slabs, curbs, etc., in housing projects at San Diego, California, and work under that contract was still in progress on December 2, 1953. On May

28, 1954, White-Ahlgren assigned to plaintiff all of its rights under said contract with the Crevette Construction Company, and all of its right, title and interest in and to certain mechanic liens recorded in connection with its performance of labor and furnishing of materials thereunder. Plaintiff's Exhibit 27 is a copy of said assignment. Pursuant to said assignment, Plaintiff was paid the sum of \$5,514.38 in November, 1954, by the Webb-Knapp Company in full discharge of the rights and mechanic liens of Wright-Ahlgren under said contract.

(29) Employer's Quarterly Federal Tax Returns covering both Withholding taxes and Federal Insurance Contributions Act taxes for the first, second and third quarters of 1954, were timely filed with Defendant by White-Ahlgren under its former name, Wright-Ahlgren Company, Inc., but were not accompanied by payment of the tax. Thereafter an amended Employer's Quarterly Federal Tax Return for the first quarter of 1954 was filed with Defendant under the name "White-Ahlgren Co.," and amended returns for the second and third quarters of 1954 were filed under the name "White-Ahlgren Co. and Century Indemnity Co." The latter two returns were executed and filed by Defendant pursuant to Section 6020(b) of the Internal Revenue Code of 1954, as amended. The amended returns were not accompanied by payment of tax. The tax assessments made against Plaintiff herein were based upon the taxes shown to be due on said amended returns. [160]

(30) An Annual Federal Tax Return of Employers under the Federal Unemployment Tax Act for the calendar year 1954 was timely filed with Defendant by White-Ahlgren under its former name, Wright-Ahlgren Company, Inc., but was not accompanied by payment of the tax. Thereafter an amended Annual Federal Tax Return of Employers under the Federal Unemployment Tax Act for the calendar year 1954 was filed under the name of "White-Ahlgren Company" but was not accompanied by payment of tax. The assessment made against Plaintiff herein on account of said tax was based on the tax shown to be due on said amended return.

That there shall be added under Paragraph VII(A), beginning on page 10 of the original Pre-Trial Conference Order, the following Plaintiff's Exhibits:

- (31) Exhibit 27—Copy of Assignment dated May 28, 1954, from Wright-Ahlgren Company to The Century Indemnity Company of all debts, accounts, claims, etc., against Crevette Construction Company, a subsidiary of Webb-Knapp Company, as well as certain mechanics' liens recorded in San Diego County.
- (32) Exhibit 28—Copy of letter dated October 7, 1954, from Robert A. Oakes to Burton A. Van Tassel.

- (33) Exhibit 29—Deposition of Robert A. Oakes, taken at La Jolla, California, on July 14, 1959.
- (34) Exhibit 30—Deposition of Harry L. Summers, taken at La Jolla, California, on July 14, 1959.
- (35) Exhibit 31—Deposition of Charles E. Sands, taken at La Jolla, California, on July 14, 1959.

There shall be added under Paragraph VII(B), beginning on page 14 of the original Pre-Trial Conference Order, the following Defendant's Exhibits:

- (11) Exhibit K—Annual Federal Tax Return of Employers (Form 940) for the calendar year 1954 of Wright-Ahlgren Co., Inc., filed November 1, 1954. [161]
- (12) Exhibit L—Annual Federal Tax Return of Employers (Form 940) for the calendar year 1954 of White-Ahlgren Co., filed August 21, 1956.
- (13) Exhibit M—Employer's Quarterly Federal Tax Return (Form 941) of Wright-Ahlgren Company, Inc., for the fourth quarter of 1953, filed August 16, 1956.
- (14) Exhibit N—Employer's Quarterly Federal Tax Return (Form 941) of White-Ahlgren Co. for the fourth quarter of 1953, filed August 16, 1956.

- (15) Exhibit O—Employer's Quarterly Federal Tax Return (Form 941) of Wright-Ahlgren Co., Inc., for the first quarter of 1954, filed April 30, 1954.
- (16) Exhibit P—Employer's Quarterly Federal Tax Return (Form 941) of White-Ahlgren Co. for the first quarter of 1954, filed August 21, 1956.
- (17) Exhibit Q—Employer's Quarterly Federal Tax Return (Form 941) of Wright-Ahlgren Company, Inc., for the second quarter, 1954, filed August 2, 1954.
- (18) Exhibit R—Employer's Quarterly Federal Tax Return (Form 941) for White-Ahlgren Co. and Century Indemnity Co. for the second quarter of 1954, filed August 21, 1956.
- (19) Exhibit S—Employer's Quarterly Federal Tax Return (Form 941) of Wright-Ahlgren Company, Inc., for the third quarter of 1954, filed November 1, 1954.
- (20) Exhibit T—Employer's Quarterly Federal Tax Return (Form 941) for White-Ahlgren Company, Inc., and The Century Indemnity Co. for the third quarter of 1954, filed August 21, 1956. [162]

The paragraph beginning on line 10, page 15, is amended and supplemented to read as follows:

Plaintiff admits the authenticity and due execution of each of Defendant's Exhibits (except as hereinafter otherwise set forth), but reserves the right to object to the introduction of any of said Exhibits on the grounds of irrelevancy, immateriality, and/or incompetency; except that Plaintiff waives any objection to the introduction of Defendant's Exhibit I on the grounds of competency and/or hearsay, reserving, however, each and all objections specifically reserved and/or made at the time of the taking of said deposition as reflected in the Reporter's Transcript thereof.

The paragraph beginning on line 14, page 15, is amended and supplemented to read as follows:

Defendant admits the authenticity and due execution of each of Plaintiff's Exhibits (except as hereinafter set forth), but reserves the right to object to the introduction of any of said Exhibits on the grounds of irrelevancy, immateriality and/or incompetency; except that Defendant waives any objection to the introduction of Plaintiff's Exhibits 29, 30, and 31 on the grounds of competency, and/or hearsay, reserving, however, each and all objections specifically reserved and/or made at the time of the taking of said three depositions as reflected in the Reporter's Transcript thereof. Defendant does not admit the authenticity and due execution of Plaintiff's Exhibits 7, 9, 22 and 23, and reserves the right to object to said [163] Exhibits on said grounds in addition to the grounds hereinabove set forth.

Nothing contained herein shall be deemed to preclude the parties from filing a further Supplemental Order for the purpose of shortening the time of trial.

Dated: September 13th, 1960.

/s/ PEIRSON M. HALL, United States District Judge.

Approved as to form and content.

/s/ ARTHUR H. DEIBERT,

/s/ BURTON A. VAN TASSEL,

/s/ A. L. BURFORD, JR.,
Attorneys for Plaintiff.

LAUGHLIN E. WATERS, United States Attorney;

EDWARD R. McHALE,
Asst. U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN, Asst. U. S. Attorney,

/s/ EUGENE N. SHERMAN,
Attorneys for Defendant,
Robert A. Riddell.

[Endorsed]: Filed September 13, 1960. [164]

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO PLAIN-TIFF'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDG-MENT

II.

Objection is made to the manner in which paragraph VI of plaintiff's proposed findings describes the circumstances under which the joint control account known as the "White-Ahlgren Trust Account No. 1" was opened. As presently proposed, this finding omits any reference to the important fact that this joint control account was required by plaintiff as a condition precedent to its issuance of the subject indemnity bond.

Both the documentary and oral evidence in this case is beyond rational dispute on this point. Thus, defendant's Exhibit "A," a letter from D. J. Waite, plaintiff's bonding manager, to Marine Development, Inc., under date of November 16, 1953 (i.e., before the bond was issued), states as follows:

"We as surety do commit ourselves to a firm agreement that upon receipt of \$25,000.00 in cash by White-Ahlgren Company, Inc., which is anticipated to be put into the corporation on or before November 25, 1953, and an advance payment of \$10,000.00 by Marine Development, Inc., to White-Ahlgren Company, Inc., which specific

sum of money is to be deposited in a special bank account of White-Ahlgren Company, Inc., of which we as surety will have joint control, we agree that when said conditions have been met that we will issue to you a bond guaranteeing the performance and payment of labor and material bills in the amount of 100% of the contract price." (Underscoring Ours.)

This requirement was consummated in the instructions issued to the Security Trust and Savings Bank of San Diego with reference to the joint control account, defendant's Exhibit "B." Said exhibit, which was signed by the representatives of plaintiff and the White-Ahlgren [173] Company, specifically declares that:

"The title to said account, and any balance that may be therein at any time is hereby vested and declared to be held by the aforesaid Trustee and Attorneys in Fact of the Century Indemnity Company, as security to the Century Indemnity Company that all funds to the credit of said account at any time shall be used solely for the purpose of paying bills for labor and material and all obligations entering into a certain construction project with reference to the completion of which said The Century Indemnity Company has executed an Indemnity Bond."

Similarly, all designated trustees over the account were acting on behalf of plaintiff (Par. III (A)(6)

on pages 3 and 4 of Pretrial Conference Order, filed October 5, 1959).

The deposition testimony of Harry L. Summers, Vice President of Marine Development, Inc., (Plaintiff's Exhibit "30"), is explicit on the point that it was his understanding from plaintiff's representative that plaintiff required the opening of the joint control account as a condition precedent to its issuance of the bond (Plaintiff's Exhibit "30," page 15, line 14, to page 16, line 19). This understanding was confirmed by the testimony of D. J. Waite, who stated that the parties concerned were advised by him that plaintiff would require a joint control account before the bond would be written. (Reporter's Partial Transcript of Proceedings, page 53, lines 2-5.)

While plaintiff concedes that it exercised joint control over the subject bank account, it would now have us believe, by virtue of the testimony of Eva L. Cole, that such control was not required by plaintiff but was really a means by which the [174] investment of Mrs. Hertha Claussen was to be protected. No evidence corroborating this theory was offered at the trial, and Mrs. Cole admitted upon cross-examination that she neither regularly consulted with or accounted to Mrs. Claussen for her conduct as trustee (Reporter's Transcript, page 21, line 5, to page 23, line 9); and that in all respects, including her activities with reference to the joint control account, Mrs. Cole was acting as an agent for the

Century Indemnity Company (Reporter's Transcript, page 28, line 24, to page 25, line 4).

In any event, the testimony of D. J. Waite is clear that, regardless of who originally conceived the idea of imposing a joint control requirement, said idea was adopted by Waite, on behalf of plaintiff, before plaintiff would issue its bond (Reporter's Transcript, page 52, line 25, to page 53, line 1), and it has been shown above that the parties concerned were so advised before the bond was written.

The clarity of the evidence on this point of objection is best demonstrated by the following excerpt from the transcript of testimony of Albert C. White (who testified after Eva L. Cole and D. J. Waite).

- "Q. And was it your understanding at that time from your conversation with Mrs. Cole that as per the letter the bonding company would require the joint control account?
- "Mr. Burford: If the court please, I assume that this is supposed to be cross-examination, none of this being covered on direct.
- "The Court: I suppose. I don't know what difference it makes with this witness.
- "Mr. Sherman: Your Honor, I think we have the witness here and it is proper cross-examination.
- "The Court: Is there any doubt but what The Century [175] Indemnity Company wanted joint control of this account?
- "Mr. Sherman: Mrs. Cole testified she has never seen that letter.

"The Court: I mean on the part of the plaintiff here. Is there any question but what Century Indemnity wanted to and did have joint control of this account?

"Mr. Burford: We have stipulated that there was joint control.

"The Court: Then why cross-examine him on it?"
"Mr. Sherman: Very well, your Honor."

(Reporter's Transcript, page 59, line 12, to page 60, line 8.)

The record shows that pursuant thereto no further examination of the witness was made on this matter.

It is submitted that the overwhelming evidence on this issue, the Court's foregoing statement of its views, the remarks of plaintiff's counsel, and defense counsel's forebearance of further cross-examination in reliance thereon, entitles the defendant to a finding that joint control of the trust account was a requirement of plaintiff. Such a finding is incorporated in paragraph VI of defendant's proposed Findings of Fact as follows:

"As a condition precedent to the issuance of said bond, plaintiff required the opening of a special bank account by White-Ahlgren Company, Inc., over which plaintiff, as surety, would have joint control. Pursuant thereto, a commercial checking account was opened in the Security Trust & Savings Bank of San Diego, California, on or about December 2, 1953, which said account was known as 'White-Ahlgren Trust Account No.'" [176]

Respectfully submitted,

LAUGHLIN E. WATERS, United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN,
Assistant U. S. Attorney,

/s/ EUGENE N. SHERMAN,
Attorneys for Defendant,
Robert A. Riddell.

[Endorsed]: Filed November 10, 1960. [177]

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

It appearing to the satisfaction of the Court that the subject matter of the judgment rendered in favor of the plaintiff and against the defendant in the above-entitled action is money exacted by or paid to the defendant and by him paid into the Treasury of the United States,

The Court hereby certifies that there was probable cause for the acts of the defendant in collecting said money and paying the same into the Treasury and that said defendant acted under the directions of the Secretary of the Treasury or other proper officer of the Government in so doing. U. S. Code, Title 28, Section 2006.

Dated: December 5th, 1960.

/s/ PEIRSON M. HALL, United States District Judge.

Certificate of Service by Mail attached.

Lodged November 10, 1960.

[Endorsed]: Filed December 5, 1960. [209]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 959-58-PH Civil

THE CENTURY INDEMNITY COMPANY, a Corporation,

Plaintiff,

VS.

ROBERT A. RIDDELL, District Director of Internal Revenue for the Los Angeles District of California,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled cause came on for trial on September 20, 1960, before the Honorable Peirson M. Hall, Chief Judge presiding, without intervention of a jury, and plaintiff was represented by its counsel, Dempsey, Thayer, Deibert & Kumler and Burton A. Van Tassel, Arthur H. Deibert and A. L. Bur-

ford, Jr., of counsel appearing, and the defendant was represented by its counsel, Laughlin E. Waters, United States Attorney, Edward R. [211] McHale, Assistant United States Attorney, Chief, Tax Division, and Eugene N. Sherman, Assistant United States Attorney, Eugene N. Sherman, of counsel appearing.

The Court having heard and considered all the evidence, stipulations of facts, exhibits, memoranda and arguments of counsel, makes the following special findings of fact and conclusions of law.

Findings of Fact

I.

At all times pertinent hereto, plaintiff was and is a corporation organized and existing under the laws of the State of Connecticut and duly qualified to do business in the State of California.

TT.

Defendant is now and since November 26, 1952, has been the duly appointed qualified and acting District Director of Internal Revenue for the Los Angeles District of California, and is the person to whom all of the taxes, penalty and interest involved herein were paid. At all times pertinent herein, defendant was and is a resident of the County of Los Angeles and the Southern District of California, Central Division.

III.

The instant action was brought by plaintiff against

defendant for refund of Withholding taxes, delinquency penalty and interest, and Federal Insurance Contributions Act taxes, delinquency penalty and interest for the period commencing the fourth quarter 1953 through and including the third quarter 1954, and Federal Unemployment Act taxes and interest for the year 1954, all of which said taxes, delinquency penalty and interest were paid by the plaintiff.

IV.

Plaintiff duly filed timely claims for refund of the taxes, delinquency penalty and interest so paid, and the instant action was timely commenced.

V.

On or about October 6, 1953, White-Ahlgren Company, Inc., entered into a subcontract with Marine Development, Inc., to do and complete all concrete work as specified for a 1,000 unit Wherry Housing Project at Camp Pendleton, California. In connection therewith, a surety bond described as [212] contract bond No. 291379 was executed on or about December 2, 1953, in the amount of \$549,138.20 by and on behalf of White-Ahlgren Company, Inc., as principal, plaintiff as surety, Marine Development, Inc., as owner, and Republic National Bank of Dallas, Texas, as mortgagee. By said surety bond plaintiff guaranteed to the owner and mortgagee the faithful performance of the aforesaid subcontract and the payment of all labor and material incurred in connection with such performance. Work

under said subcontract commenced on or about December 7, 1953.

VI.

White-Ahlgren Company, Inc., opened a commercial checking account in the Security Trust and Savings Bank of San Diego, California, on December 2, 1953, which said account was known as "White-Ahlgren Trust Account No. 1," over which White-Ahlgren Company, Inc., and plaintiff, as surety, would have joint control. The resolutions and signature cards filed with the aforesaid bank required all checks drawn against said Trust Account No. 1 by an authorized signatory of White-Ahlgren Company, Inc., to be countersigned by any one of several designated representatives of plaintiff who was to sign as trustee.

VII.

Except for retention payments in the sum of \$54,249.18 paid directly by Marine Development, Inc., to plaintiff on December 17, 1954, all progress payments made by Marine Development, Inc., under the aforesaid subcontract were required to be and were deposited directly into said Trust Account No. 1.

VIII.

At no time pertinent herein did plaintiff have control over the employees of White-Ahlgren Company, Inc., with reference to the hiring and discharge of said employees, the work to be performed by said employees, the hours during which said employees

were to perform their work, and the rate of pay to be received by said employees for their services.

IX.

Plaintiff did not have control of the payment of the wages of the employees of White-Ahlgren Company, Inc., for the services rendered [213] by said employees between December 7, 1953, and March 8, 1954, during which period a weekly check made payable to White-Ahlgren Company, Inc., drawn on the aforesaid Trust Account No. 1, was signed by an authorized signatory of White-Ahlgren Company, Inc., and countersigned by a duly authorized representative of plaintiff as trustee, as follows:

A check in the gross amount due of each weekly payroll between December 7, 1953, and January 11, 1954, and a check in the net amount due (as said term is defined in paragraph X, herein) of each weekly payroll between January 12, 1954, and March 8, 1954.

X.

Commencing March 9, 1954, and ending with the completion of the aforesaid subcontract on September 17, 1954, wage payments were made weekly to the employees of White-Ahlgren Company, Inc., directly from the aforesaid Trust Account No. 1. Said wage payments were made by means of individual checks drawn against said Trust Account No. 1, which were made payable to the order of each individual employee in the net amount due, said "net amount due" being the weekly gross

amount of wages due, less Federal Withholding and Federal Insurance Contributions Act taxes and state taxes. Each of said checks was signed by an authorized signatory of White-Ahlgren Company, Inc., and was countersigned by a duly authorized representative of plaintiff who countersigned as trustee. The only job being performed by White-Ahlgren Company, Inc., during the periods set forth in this paragraph was the aforesaid subcontract with Marine Development, Inc., and at no time during said period did White-Ahlgren Company, Inc., receive any funds from any other job, contract or subcontract.

XI.

Plaintiff had control of the payment of the wages of the employees of White-Ahlgren Company, Inc., for the services rendered by said employees between March 9, 1954, and September 17, 1954.

XII.

All conclusions of law which are or are deemed to be findings of fact [214] are hereby found as facts and are incorporated herein as findings of fact.

Conclusions of Law

T.

This Court has jurisdiction of the subject matter and over the parties hereto.

TT.

At all times pertinent herein, plaintiff was not the "employer" of the employees of White-Ahlgren

Company, Inc., within the meaning of §§ 1401, 1410, and 1426(d) of the 1939 Internal Revenue Code, as amended.

III.

Plaintiff is not liable to the defendant for the payment of the Federal Insurance Contributions Act taxes required to be collected and paid by said §§ 1401 and 1410 and is entitled to judgment against the defendant for refund of the taxes, delinquency penalty and interest so paid in the amount of \$10,-278.37, plus interest as provided by law.

IV.

At all times pertinent herein, plaintiff was not the "employer" of the employees of White-Ahlgren Company, Inc., within the meaning of §§ 1600 and 1607(i) of the Internal Revenue Code of 1939, as amended.

V.

Plaintiff is not liable to defendant for the payment of the Federal Unemployment Act taxes required to be paid by said § 1600 and is entitled to judgment against defendant for refund of the taxes and interest so paid in the amount of \$4,113.39, plus interest as provided by law.

VI.

Plaintiff was not the "employer" of the employees of White-Ahlgren Company, Inc., for the period between December 7, 1953, and March 8, 1954, within the meaning of §§ 1621(d), 1622(a) and 1623 of the Internal Revenue Code of 1939, as amended.

VII.

Plaintiff is not liable to defendant for the payment of the Withholding taxes for the period between December 7, 1953, and March 8, 1954, required [215] to be deducted, withheld and paid by said §§ 1622(a) and 1623 and is entitled to judgment against defendant for refund of the taxes, delinquency penalty and interest so paid for said period in the amount of \$8,383.10, plus interest as provided by law.

VIII.

Plaintiff is entitled to judgment against defendant for its costs of suit herein to be taxed by the Clerk of this Court.

IX.

Plaintiff was the "employer" of the employees of White-Ahlgren Company, Inc., between March 9, 1954, and September 17, 1954, within the meaning of §§ 1621(d), 1622(a) and 1623 of the 1939 Internal Revenue Code, as amended.

X.

Plaintiff is liable to defendant for the payment of the Withholding taxes for the period between March 9, 1954, and September 17, 1954, required to be deducted, withheld and paid by said §§ 1622(a) and 1623, and defendant is entitled to judgment that plaintiff take nothing herein with reference to the taxes and interest so paid by plaintiff for said period.

XI.

All findings of fact which are or are deemed to

be conclusions of law are hereby incorporated in these conclusions of law.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, It Is Hereby Ordered, Adjudged and Decreed that:

- (1) Plaintiff have judgment against defendant for refund of Federal Insurance Contributions Act taxes, delinquency penalty and interest paid by plaintiff to defendant in the amount of \$10,278.37, plus interest as provided by law.
- (2) Plaintiff have judgment against defendant for refund of Federal Unemployment Act taxes and interest paid by plaintiff to defendant in the amount of \$4,113.39, plus interest as provided by law.
- (3) Plaintiff have judgment against defendant for refund of Withholding [216] taxes, delinquency penalty and interest for the period between December 7, 1953, and March 8, 1954, paid by plaintiff to defendant in the amount of \$8,383.10, plus interest as provided by law.
- (4) Plaintiff have judgment against defendant for its costs of suit taxed by the Clerk of this Court in the amount of \$188.50.
- (5) Plaintiff taking nothing with respect to Withholding taxes and interest paid by plaintiff to defendant for the period between March 9, 1954, and September 17, 1954.

Dated: This 5th day of December, 1960.

/s/ PEIRSON M. HALL, United States District Judge.

Receipt of copy acknowledged.

Lodged November 2, 1960.

[Endorsed]: Filed December 5, 1960.

Entered December 6, 1960. [217]

[Title of District Court and Cause.]

BILL OF COSTS

Judgment having been entered in the above-entitled action on the 6th day of December, 1960, against Defendant, the clerk is requested to tax the following as costs:

Bill of Costs

Fees of the clerk\$	15.00
Fees of the marshal	5.50
Fees of the court reporter for all or any part	
of the transcript necessarily obtained for	
use in the case	77.50
Fees for witness (itemized on reverse side)	7.20
Fees for exemplification and copies of papers	
necessarily obtained for use in case	
Docket fees under 28 U.S.C., 1923	30.00
Cost incident to taking of depositions (*See	
Below)	71.55
_	
Total\$2	206.75

*Deposition of Harry L. Summers	
(original only)	\$28.80
Deposition of Robert A. Oakes	
(original only)	27.00
Deposition of Charles E. Sands	
(original only)	15.75
	Φ 71 55

State of California,
County of Los Angeles—ss:

I, Arthur H. Deibert, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Laughlin E. Waters, U. S. Atty.; Edw. R. McHale, Asst. U. S. Atty.; Eugene N. Sherman, Asst. U. S. Atty., 808 Federal Bldg., Los Angeles 12, Calif., with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk to tax said costs on the 12th day of December, 1960, at 10:00 a.m.

/s/ ARTHUR H. DEIBERT, Attorney for Plaintiff.

Subscribed and sworn to before me this 7th day of December, A.D. 1960, at Los Angeles, California.

[Seal] /s/ DOROTHY ERBEN,
Notary Public.
My Commission Expires September 28, 1963.

Costs are hereby taxed in the amount of \$7.20 this 27th day of December, 1960, and that amount included in the judgment.

JOHN A. CHILDRESS, Clerk, U. S. Dist. Court, So. Dist. of Calif.

Witness Fees (computation, cf. 28 U.S.C. 1821 for statutory fees)

Name and Residence: Hertha C. White, 5349 Rhea Avenue, Tarzana, California.

Attendance

Days: 1.

Total Cost\$4.00

Mileage

Miles: 40.

 Total Cost Each Witness
 \$7.20

 Total
 \$7.20

[Endorsed]: Filed December 7, 1960.

[Title of District Court and Cause.]

OBJECTIONS TO PLAINTIFF'S BILL OF COSTS

To the Clerk of the Above-Entitled Court:

Comes Now the defendant and objects to the taxing of the following items of cost claimed in plaintiff's Bill of Costs filed December 7, 1960:

1.	Fees of the Clerk\$15.00
2.	Fees of the Marshal\$ 5.50
	(to the extent that such fees were in-
	curred prior to joinder of issue)
3.	Fees of the Court Reporter for tran-
	script obtained for use in the case\$77.50
4	Docket fees \$30.00

5. Cost incident to taking of depositions.\$71.55
Said objection is made upon the ground that each

of said alleged items of cost is not allowable as a cost under Title 28 U.S.C. §2412(b), [221] which

provides as follows:

"In an action under subsection (a) of section 1346 or section 1491 of this title, if the United States puts in issue plaintiff's right to recover, the district court or Court of Claims may allow costs to the prevailing party from the time of joining such issue. Such costs shall include only those actually incurred for witnesses and fees paid to the clerk."

Objection to the taxing of the fees claimed for the court reporter (\$77.50) is also made upon the ground that no portion of the transcripts or partial transcripts of trial were "necessarily obtained for use in the case" within the meaning of Title 28 U.S.C. §1920(2).

LAUGHLIN E. WATERS, United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN,
Assistant U. S. Attorney,

/s/ EUGENE N. SHERMAN,
Attorneys for Defendant,
Robert A. Riddell.

Receipt of Copy acknowledged. [222]

Dec. 30, 1960.

Eugene N. Sherman, Esq., Room 808, U. S. Post Office & Courthouse Bldg., Los Angeles 12, Calif.

Arthur H. Deibert, Esq., Suite 1104, 523 W. 6th St., Los Angeles, Calif.

Re: Century Indemnity Co., a Corp. vs. R. A. Riddell, Int. Rev. No. 959-58 PH

Gentlemen:

This is to inform you that today the Clerk taxed costs in the above case in favor of plaintiff against defendant in the amount of \$7.20.

Under local court rule 15(c) a review of this decision may be taken to the court on motion to retax, by either party, upon written notice thereof, served and filed with the clerk within five days after the costs have been taxed but not afterward.

Pursuant to 289 U. S. 373, Moore Ice Cream Co. vs. Rose, the filing of a Certificate of Probable

Cause, as was done in the present case, converts the suit against the District Director into a suit against the Government. As such it is subject to the limitations of 28 U.S.C. 2412(b), so that only fees actually incurred for witnesses and fees paid to the clerk subsequent to joining of issue may be taxed.

Only the \$7.20 paid to witnesses may properly be taxed therefor under Sec. 2412(b).

Very truly yours,

JOHN A. CHILDRESS, Clerk.

By EDW. F. DREW, Chief Deputy. [224

Title of District Court and Cause.

ORDER RE-TAXING COSTS

Upon consideration of plaintiff's motion to re-tax costs, memoranda submitted by counsel for the parties hereto, and oral argument upon said motion on January 16, 1961:

It Is Hereby Ordered, Adjudged and Decreed, that said motion be and it is hereby granted and that the following costs be taxed in favor of plaintiff agaist defendant: [241]

Fees	of	the	Clerk\$	15.00
Fees	of	the	Marshal	5.50

Fees of the Court Reporter for all or any	
part of the transcript necessarily obtained	
for use in the case	50
Fees for witnesses	20
Docket fees under 28 U.S.C. 1923 27.5	50
Costs incident to taking of depositions 55.8	30
Total\$188.5	50

Dated: January 18th, 1961.

/s/ PEIRSON M. HALL, Judge.

Approved as to form.

LAUGHLIN E. WATERS, United States Attorney,

By /s/ EUGENE N. SHERMAN,
Assistant United States Attorney.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 18, 1961. [242]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Above-Named Defendant and His Attorneys, Laughlin E. Waters, United States Attorney for the Southern District of California; Edward R. McHale and Eugene N. Sherman, Assistants United States Attorney for Said

District, 808 Federal Building, Los Angeles 12, California:

You, and Each of You, Are Hereby Advised that the plaintiff, The Century Indemnity Company, in the above-entitled action, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the part of the judgment entered December 5, 1960, in paragraph (5) thereof holding that plaintiff take nothing with respect to [244] Withholding taxes and interest paid by plaintiff to defendant for the period between March 9, 1954, and September 17, 1954.

Dated: This 2nd day of February, 1961.

/s/ ARTHUR H. DEIBERT,

/s/ A. L. BURFORD, JR., Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed February 2, 1961. [245]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

Please Take Notice that the defendant, Robert A. Riddell, District Director of Internal Revenue for the Los Angeles District of California, does hereby cross-appeal to the United States Court of Appeals for the Ninth Circuit as follows:

(a) from those portions of the judgment entered

in the civil docket, December 6, 1960, in the above action which decreed that:

- (1) Plaintiff have judgment against defendant for refund of Federal Insurance Contributions Act taxes, delinquency penalty and interest paid by plaintiff to defendant in the amount of \$10,278.37, plus interest as provided by law.
- (2) Plaintiff have judgment against defendant for refund of Federal Unemployment Act taxes and interest paid by plaintiff to defendant in the amount of \$4,113.39, plus interest as provided by law.
- (3) Plaintiff have judgment against defendant for [247] refund of Withholding taxes, delinquency penalty and interest for the period between December 7, 1953, and March 8, 1954, paid by plaintiff to defendant in the amount of \$8,383.10, plus interest as provided by law.
- (4) Plaintiff have judgment against defendant for its costs of suit taxed by the Clerk of this Court in the amount of \$188.50.
- (b) from the Order Re-Taxing Costs in the amount of \$188.50, filed and entered January 18, 1961.

Dated: February 3, 1961.

LAUGHLIN E. WATERS, United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN,
Assistant U. S. Attorney,
/s/ EUGENE N. SHERMAN,
Attorneys for Defendant.

Certificate of Service by Mail attached.

[Endorsed]: Filed February 3, 1961. [248]

[Title of District Court and Cause.]

STATEMENT OF POINTS APPELLANT THE CENTURY INDEMNITY COMPANY INTENDS TO RELY ON ON APPEAL

Appellant, The Century Indemnity Company, a corporation, intends to rely on the following points on its appeal herein to the above-entitled Court:

- (1) The Trial Court erred in finding that Plaintiff had control of the payment of the wages of the employees of White-Ahlgren Company, Inc., for the services rendered by said employees between March 9, 1954, and September 17, 1954.
- (2) The Trial Court erred in finding that Plaintiff was the employer of the employees of White-Ahlgren Company, Inc., between March 9, 1954, and September 17, 1954, within the meaning of §§ 1621 (d), 1622(a) and 1623 of the 1939 Internal Revenue Code, as amended.
- (3) The Trial Court erred in holding that Plaintiff take nothing with respect to withholding taxes and interest paid by Plaintiff to Defendant for the period between March 9, 1954, and September 17, 1954.

Dated: April 21, 1961.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ ARTHUR H. DEIBERT,
Attorneys for Appellant, The
Century Indemnity Co.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 21, 1961. [257]

In the United States District Court, Southern District of California, Central Division No. 959-58-PH Civil

THE CENTURY INDEMNITY COMPANY,

Plaintiff,

VS.

ROBERT A. RIDDELL, Etc.,

Defendant.

Honorable Peirson M. Hall, Judge Presiding.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

Tuesday, September 20, 1960

Appearances:

For the Plaintiff:

DEMPSEY, THAYER, DEIBERT & KUMLER, by
A. L. BURFORD, JR., ESQ.; and
ARTHUR H. DEIBERT, ESQ.

For the Defendant:

LAUGHLIN E. WATERS,

United States Attorney, by

EUGENE SHERMAN,

Assistant United States Attorney.

EVA L. COLE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: Eva L. Cole; C-o-l-e.

The Clerk: Your address, please.

The Witness: 548 South Spring Street, Los Angeles 13.

Direct Examination

By Mr. Burford:

Q. Mrs. Cole, I would like to ask you just a few questions, preliminary questions, to set your background.

I believe you are in the insurance business?

- A. I am.
- Q. What is the name of your company?
- A. Cole Insurance Agency, Inc.
- Q. About how long have you been in the insurance business?

 A. All my life.
 - Q. What type of insurance do you handle?
 - A. All lines of insurance.

The Court: Without touching upon a delicate subject, let us say how many years' experience you have had in the insurance business. [21*]

^{*}Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Witness: 44 Years.

- Q. (By Mr. Burford): Have you ever represented any insurance companies?

 A. Yes, sir.
- Q. Were you authorized agent for The Century Indemnity Company in 1953? A. Yes.
- Q. Now, Mrs. Cole, you are of course familiar with this subcontract which is between Marine Development and White and Ahlgren, Inc., which is Plaintiff's Exhibit 1-B in evidence. A. Yes.
- Q. Now were you contacted by any representative of White and Ahlgren, Inc., the subcontractor, with reference to procuring a surety bond?
 - A. Yes.
 - Q. Who contacted you?
 - A. Both Mr. Ahlgren and Mr. White.
 - Q. Do you know approximately when that was?
 - A. Around the 1st of October, 1953.
- Q. Had you met either of these gentlemen before? A. Yes.
- Q. What were the circumstances under which you met them, just briefly?
- A. I had met Mr. Ahlgren in connection with other contract [22] bonds for a firm known as Wright-Ahlgren Company. At the time of this job Mr. White was brought in and the name had been changed from Wright-Ahlgren to White and Ahlgren. That is when I met Mr. White for the first time.
- Q. What procedure do you normally follow when someone comes to your office and requests a surety bond?

- A. We would have to have a financial statement which must qualify for the bond, and then we have to investigate the background and find out whether they have the ability to do the work. The companies require a minimum of 10% in current assets to write a bond, not only on the job, but the work on hand.
- Q. What procedure did you follow in connection with this application?
- A. We requested an up-to-date financial statement, and it was brought in. The assets were sufficient but there was not enough cash to start the job.

So it was submitted to The Century Indemnity Company and they advised me that they would have to have \$25,000 more cash than the statement showed.

- Q. This is the statement of White and Ahlgren?
- A. Yes.
- Q. Who did you submit this application on behalf of?
- A. To the manager of the bond department at The Century Indemnity Company, Mr. Waite. [23]
 - Q. Is that D. J. Waite? A. D. J. Waite.

He submitted it to his home office who, in turn, notified him that although White and Ahlgren had considerable assets, some of their current assets were deferred, that they couldn't get hold of their money immediately.

Mr. Sherman: Your Honor, I move to strike that portion of the witness' answer which pertains to what the home office told Mr. Waite as heresay.

The Court: I think it is hearsay.

- Q. (By Mr. Burford): Mrs. Cole, just state what you know of your own knowledge. What did Mr. Waite tell you?
- A. He told me that his home office needed a minimum of \$25,000 additional cash.
 - Q. Then what did you do?
- A. I relayed the information to the contractor and then I dropped the subject until they came to me later on.
 - Q. Until what?
- A. I dropped the matter until they came to me later on.
 - Q. About when was this?
- A. A short while later. Mr. White came to see me and wanted to know whether it was possible for us to accept money that was loaned to them.
 - Q. When you say "us"—[24]
 - A. I mean the White and Ahlgren Company.

And I told them that was possible if the people loaning money to the contractor would subordinate the money until the job was completed and the bond was exonerated.

- Q. Then what did he do?
- A. He mentioned to me at the same time that he knew of a party who would loan the corporation, his company, \$15,000 but the loan was subject to the money being in the job and being assured that the money would be used in the job.

Mr. Sherman: May I have that last answer read back, please.

(Record read.)

Mr. Sherman: I move to strike that again as hearsay. Obviously this testimony is being offered to show what some third party not present stated the conditions would be to their offering money in the company. I don't think that this witness is qualified to pass on the truth of that, it is being offered for the truth, and therefore it is hearsay.

The Court: Objection overruled.

- Q. (By Mr. Burford): Now, Mrs. Cole, what did you do as a result of this conversation?
- A. I told Mr. White that the only way that the party could be assured that the money would be used in the job is by [25] having all monies under joint control, and I suggested that they handle it through a professional joint control company, that I didn't feel qualified to handle it.

He left and he brought me a Mrs. Clausen, a week later or thereabouts, and she was the person who was going to loan the money, but again she wanted to make sure that the money would be used on the job, and I told her that the only way that she could be sure that the money would be used on the job was that it would be held under joint control.

- Q. Did you explain to her or to Mr. White what you meant by "joint control"?
- A. I only told them that all monies would be paid through that account, that a special account

would have to be opened and all monies would be paid through that account, that that was all I understood about joint control and I wasn't experienced enough to give out more information.

- Q. As a result of that conversation what then happened?
- A. I told Mr. White that \$15,000 was not sufficient to meet the company's requirements, that another \$10,000 would have to be raised.

He told me that then he thought they could borrow on their equipment another \$10,000, and I told them it was up to them to work out their problems, and I dropped the matter until they came out later and told me they had made arrangements [26] to borrow \$10,000 on their equipment, and that Mrs. Clausen was willing to loan \$15,000 provided this \$25,000 would be put under joint control, and the money was not deposited by Mrs. Clausen until the morning the bond was written and she wouldn't deposit the money in the account until the other \$10,000 was available.

- Q. Now you did submit a new application to The Century Indemnity Company as a result of this?

 A. Yes.
- Q. And the date of that is shown on the exhibit as December 2, 1953?

 A. Yes.
- Q. Now returning to this joint control problem again——

The Court: Just a moment. The application I have here, Exhibit 2, is dated October 6, 1953.

Mr. Burford: I stand corrected, your Honor. The contract started then. It was October.

The Witness: The application was submitted to me at that time.

The Court: October 6?

The Witness: Yes, when they first came to me.

Q. (By Mr. Burford): That is the application?

A. That is the application, yes. [27]

Q. And on the basis of which the bond was ultimately written?

A. Yes.

The Court: Then the money wasn't deposited until December 2nd. Is that right?

The Witness: Correct.

The Court: That is, \$25,000?

The Witness: Yes.

The Court: In the Security Trust & Savings Bank at San Diego?

The Witness: Yes.

Q. (By Mr. Burford): In connection with that account, Mrs. Cole, will you describe how that was set up?

A. Well, the account was opened the morning that I brought the bond out in San Diego to whereby White and Ahlgren would authorize the payment, approve the bills, sign the checks, and I would countersign them.

Q. In what capacity were you countersigning?

A. As trustee for The Century Indemnity Company.

Q. Did you have discussions with anyone repre-

senting The Century Indemnity Company in connection with your signing this account as trustee?

A. I talked with Mr. Waite about it and they had nothing to do with this joint control, it was a requirement of [28] Mrs. Clausen. The only reason I used the company is because I had no standing with any bank, and I had told the contractor that they would not accept a joint control with me personally as I was not in the business. So therefore in order for a bank to accept a joint control they would have to have a responsible person, and I approached Mr. Waite and asked his permission to handle it through The Century Indemnity Company, and he consented to it.

- Q. With whom did you deal at the bank.
- A. Mr. Frazier.
- Q. Now, Mrs. Cole, on the first signature card, which I believe is Exhibit 4-A, you are shown there as signing as a secretary of the company, I believe.
- A. That was a mistake. I recall that, and I told Mr. Frazier that I was not the secretary, and he was supposed to correct it.
- Q. In other words, this is where you signed on the line just above the word "secretary"?

Mr. Sherman: May I see where it is?

(Exhibiting document to counsel.)

The Witness: Yes.

The Court: And that was superseded by a new card on December 8th.

Mr. Sherman: Dated December 2nd.

The Court: It is dated on this card, [29] Exhibit 4-A, December 8, 1953, "Superseded by New Card," and while this statement on the back here is dated 12-2-53, nevertheless it states on the front of the card December 8, 1953.

Is there any question but what the 4-B superseded 4-A on December 8th?

Mr. Sherman: No.

Mr. Burford: No question.

The Court: Very well; let us get on.

- Q. (By Mr. Burford): Mrs. Cole, at no time then, if I understand your testimony, were you an officer in any capacity for White and Ahlgren, Inc.?
 - A. No.
- Q. Now on these signature cards, at least 4-A and 4-B, there is a notation, 548 South Spring St., Los Angeles, California. Do you know what that is?
 - A. That is my office.
 - Q. That is your office? A. Yes.
- Q. In other words the statements were to be sent to you? A. Yes.
- Q. Who kept the checkbook on this White and Ahlgren Trust Account No. 1 at this time?
 - A. I did. [30]
 - Q. Do you know if there were other checkbooks?
 - A. I don't know.
 - Q. But you at least had one?
 - A. I had one.
- Q. Now will you please explain to the Court briefly your understanding of the arrangement between you then acting as trustee and White and

Ahlgren, Inc., as to how you were to handle checks.

The Court: What were you trustee of?

The Witness: I beg your pardon?

The Court: What were you a trustee of? The Witness: The joint control account.

The Court: You were trustee of Mrs. Clausen's

money and the \$10,000 that was raised?

The Witness: That is right. I explained to her that although I was not an expert in joint control, I had handled a few when I used to work for a company and that the usual procedure was that all monies were deposited in an account and all bills were paid out of that account, and in this particular case, since I wasn't getting any money for it, to save time I suggested to Mrs. Clausen that I send a check for the gross amount of payroll every week, which would eliminate my having to go to San Diego once a week to pay all the employees and that they were to let me know what amount was needed, and I would countersign the check to save time and mail it to [31] them, and for them to deposit it in their own general account, and they would meet the payroll out of that account.

That is what they did for several months.

Then all the other bills would be sent to me approved by the contractor and I would make the check out in accordance with the amount that they had approved and countersign it, send it over to them for their signature. The fact that I had the book in my office was purely to save time and correspondence and letters.

- Q. (By Mr. Burford): Now, Mrs. Cole, these were weekly payrolls?

 A. Yes.
- Q. Going back over your testimony just a minute, just taking a particular payroll, the week ending December 18th just as an example—
 - A. Yes.
- Q. —you received from the bookkeeper of the company what?
- A. I would get—I don't remember exactly what took place but I used to get—a telephone call, as I remember it, telling me the amount that was needed for the whole week's payroll, and I would fill out that amount and send it on to them. The agreement was that they were to send me a list of the employees that they had paid, the amount paid to each employee to account for that money, and every week they would [32] mail this payroll recapitulation which would account for the money I had sent to them.
- Q. Now at the beginning of the contract, what was the arrangement for covering the payroll, was that one check or individual checks?
 - A. One check.
 - Q. To whom was that payable?
 - A. White-Ahlgren Company.
 - Q. How did this work out?
- A. Well, it worked out fine until I got a statement from the bank in February, in which was listed so many employee payroll checks that I hadn't countersigned, and I immediately called Mr. Frazier and asked him what the meaning of it was,

since I hadn't countersigned the checks, how come they had honored it on that particular account.

He explained to me that a mistake had been made, so he told me that he wanted to be released of all liability as to this mistake.

I was fearful that I couldn't get another bank to take the account, so I had to release him, but White-Ahlgren promised that they would make up the difference in that particular account.

They were also supposed to use their other assets to finance the work because the \$25,000 was just a minimum amount and they had supposedly other assets to finance this [33] work. The bonding Company wasn't supposed to finance the work.

So they paid the checks out of the weekly gross check that I sent them, but some time the latter part of March I had received some phone calls from banks that checks were received with NSF on the White-Ahlgren employee checks.

Q. What do you mean by "NSF"?

A. Not Sufficient Funds—on employees that, according to the list that they had sent me, I had mailed a check in the gross payment that I had made to them.

So I immediately called White-Ahlgren and asked them the meaning of it. They had no explanation except the fact——

Mr. Sherman: At this point, your Honor, I will object. I didn't want to interrupt the testimony of the witness, but whenever the witness refers to the fact she had a conversation with White-Ahlgren I

think for the record we should specify who she spoke to.

The Court: Yes, I think so.

If you will excuse me, Counsel, the Land Commissioners are in recess and wish a conference with me.

We will have a short recess.

(Short recess.)

The Court: You may proceed.

Mr. Burford: I wonder if you would read back the last [34] question and answer.

(Record read.)

The Court: When you called White-Ahlgren, the objection was that you should state who you talked to.

The Witness: Usually it was the bookkeeper, Mrs. Higgins.

- Q. (By Mr. Burford): In this particular instance we are referring to?
- A. I believe I talked with Mr. Waite. I don't recall exactly.
- Q. That is in connection with these checks marked NSF?

 A. Yes.
- Q. Now, Mrs. Cole, let me go back just a minute so we can refresh our recollection on this testimony to date.

In connection with the payrolls themselves, you wrote a check in these early payrolls for the gross

amount of the wages as shown on this recap furnished you?

- A. They would call me and give me a gross amount that they wanted, and I sent them a check and they had to account for that money.
- Q. Where was that check deposited, do you know? A. I don't know.
 - Q. To whom was it made out?
 - A. White-Ahlgren Company. [35]
- Q. Did you have anything to do with writing the individual payroll checks during this early period? A. No.
- Q. Then you testified, I believe, that you received a bank statement? A. Yes.
- Q. And this bank statement indicated to you that things hadn't been going the way you had anticipated?
- A. Yes. I checked up when I found out that the bank had honored checks without my countersignature.
- Q. You found out about that when you received the bank statement? A. That is right.
- Q. Now, Mrs. Cole, I would like to show you Plaintiff's Exhibit 25, which is a letter signed by you under date of January 15, 1954, addressed to the Security-First National Bank of San Diego, attention Mr. Frazier. A. Yes.
- Q. This letter states—perhaps I should read it for the record:
- "Confirming our telephonic conversation relative to the above account, as trustee for The Century

Indemnity Company, I hereby approve the payment of payroll checks——"

The Court: I have read the letter. If you have some [36] questions to direct to her, you may ask them.

Mr. Burford: Fine.

Q. Mrs. Cole, will you explain to the Court the circumstances under which you wrote that letter?

A. I went to San Diego because of the fact that these checks had been honored by the bank without my countersignature, and the bank wanted to be relieved of liability, and they requested a letter, and while I was in San Diego I wrote a letter, and I found out at that time that the bank had printed some prior checks to be used——

Mr. Sherman: One moment.

I will object to this and ask that it be stricken. It is again hearsay by this witness and it is beyond the scope of the question asked, what she found out or heard that the bank had or had not done, which is not within the scope of this witness' knowledge until she so establishes it.

The Court: The objection is overruled.

The Witness: I found out that they had printed checks in their possession marked "Payroll Account No. 1," I think it was, so Mr. Frazier wanted some authority and I wrote this letter.

- Q. (By Mr. Burford): This is a letter you referred to in your earlier testimony?
 - A. Yes.
 - Q. Ratifying the cashing of these checks with-

out your [37] signature or any other trustee signature on it? A. Yes.

Mr. Burford: If your Honor please, at this time I would like to introduce in evidence as Plaintiff's Exhibit next in order as one group the checks in question which were written on the White-Ahlgren Trust Account No. 1 without the countersignature of any trustee.

The Court: Are they described in your pretrial order?

Mr. Burford: No, your Honor, they aren't referred to in there.

What we would like to do upon stipulation of counsel at this time is to introduce these checks, at the end of the trial substitute a list of the checks just indicating the basic data.

Mr. Sherman: I have no objection to that procedure, your Honor.

The Court: I think your last number is 35 so we will call that Exhibit 36.

(The documents referred to were marked as Plaintiff's Exhibit No. 36 and received in evidence.)

The Court: How long did this practice continue where you sent them a check for the gross amount of each week's payroll?

The Witness: That was until the latter part of March when [38] I discovered that checks were being paid and without funds, although I had already sent them the money, so I notified them at

that time that if I had to pay the employees twice that the only recourse I had was to give them individual checks.

Mr. Sherman: Excuse me. May we again determine, your Honor, who she means by "they"?

The Court: Yes.

The Witness: The contractor.

The Court: Who did you call?

The Witness: White-Ahlgren.

The Court: Mr. White or Mr. Ahlgren?

The Witness: Mostly Mr. White. Mr. Ahlgren was very ill and I didn't talk to him very often at that time.

Q. (By Mr. Burford): Now, Mrs. Cole, I am not quite sure you understood his Honor's question. I believe his question was not when did you start writing individual checks, but when did you start writing checks for the net payroll rather than the gross payroll.

The Court: No, I didn't understand anything about the gross payroll. I understood her testimony to be that when the account was first opened she signed the individual payroll checks.

The Witness: Weekly, one weekly check for all of the [39] employees payroll.

The Court: The account was opened on December 2, 1953?

The Witness: Yes, your Honor.

The Court: Then until the latter part of March you issued one check for the gross amount of the weekly payroll to White-Ahlgren, is that right?

The Witness: Yes, your Honor.

The Court: Then your practice changed?

The Witness: It changed the latter part of March when checks were not being honored.

The Court: All right.

Q. (By Mr. Burford): What did you do then?

A. Then I would go to San Diego and the contractor, either Mrs. Higgins or Mr. White, would have the checks all prepared for my countersignature, and I would countersign them and leave.

- Q. These were individual payroll checks?
- A. Individual to each employee.
- Q. They of course would be the net amount due on the payroll?
 - A. I don't know. I had no record.
- Q. Now, Mrs. Cole, in connection with your countersigning checks, just how did you determine what checks to sign other than payroll checks about which you have testified? [40]
- A. My agreement with Mrs. Clausen was that Mr. White or Mr. Ahlgren would approve the disbursement and I would countersign their check.

The Court: That is to say, for materialmen?

The Witness: And labor.

The Court: No, let us talk about materialmen from the beginning.

The Witness: Yes, your Honor.

The Court: From the beginning did you sign separate checks to all accounts other than labor?

The Witness: I countersigned all checks for material approved by White-Ahlgren Company.

The Court: From the beginning?

The Witness: From the beginning.

The Court: Not in gross weekly amounts?

The Witness: No.

The Court: And you continued to do that throughout your relationship?

The Witness: I did, your Honor.

- Q. (By Mr. Burford): Mrs. Cole, did you ever refuse to countersign any checks upon request?
 - A. Only when there was no money in the bank.
- Q. Did you take any steps to determine whether a particular check was applicable to this particular contract? [41]
- A. On the bills that the contractor, White-Ahlgren, sent me it would relate to the job and they would usually mark it "job site," and I would verify that it was the job, we had the money under joint control, and I would countersign the check.

The Court: How do you mean you verified it was from the job?

The Witness: I wanted to make sure that it was material delivered on the job site, on the bond.

The Court: Did you do it other than just looking at the bill or did you go down and check on the job?

The Witness: No, I did not check up on the job. I never went and checked up any material on the job.

The Court: How did you verify it?

The Witness: Purely by the description.

The Court: On the bill?

The Witness: On the bill and the bond that I had.

The Court: In other words, you compared the description on the bill with the description of the job and the bond?

The Witness: Yes, your Honor.

The Court: I see.

Mr. Burford: Your Honor, at this time I would like to introduce as Plaintiff's Exhibit No. 10 a letter from Oakes & Horton, attorneys at law, San Diego, addressed to Miss Eva L. Cole, dated March 23, 1954, and signed by Robert A. Oakes. [42]

Mr. Sherman: No objection, your Honor.

The Court: Is that described in your pre-trial order?

Mr. Burford: That is correct, as Exhibit No. 10.

(The document referred to was marked as Plaintiff's Exhibit No. 10 and received in evidence.)

- Q. (By Mr. Burford): Mrs. Cole, directing your attention to about the middle of March, 1954, did you receive any communication from Marine Development, Inc., or any representative of that company in this subcontract? A. Yes.
 - Q. What was that?
- A. Mr. Summers called for a meeting of a representative of The Century Indemnity Company and myself for Monday morning at 9:00 o'clock in Camp Pendleton. He called me at 12:30 on a Saturday and I tried to contact Mr. Waite and I couldn't reach him so I went alone.

- Q. What happened at that conference?
- A. The meeting was to call upon the company that the contractor was behind schedule in their work and they wanted them to step up their operations, and the letter came forward from Mr. Oakes, which you showed to me, and I turned it over to the bonding company for their disposition.
- Q. In other words, you are referring now to the letter, [43] Plaintiff's Exhibit 10, which is addressed to you? A. Yes.
- Q. You turned that over to the bonding company?

 A. Mr. Waite.
 - Q. Mr. Waite? A. That is right.
 - Q. Then what did you do then?
 - A. From then on—

The Court: That is this letter, Exhibit 10?

Mr. Burford: Yes, your Honor.

The Witness: Yes, sir.

Then the company decided——

- Q. (By Mr. Burford): What did you do then?
- A. The matter was turned over to the company for handling.

The Court: To the bonding company?

The Witness: To the bonding company.

- Q. (By Mr. Burford): Did that end your action as a trustee for the bonding company?
- A. Not immediately. I went to San Diego with Mr. Van Tassel, the counsel for The Century Indemnity Company, and we handled, I believe he and I, I should say, handled a joint control for a couple of weeks longer, as I remember, but then

we were short of money and the company went and took the matter over, and I had nothing more to do with it, about a month or so later, the latter part of April or May. [44]

- Q. In other words, that ended your connection with the joint control account on the countersigning of checks and any activity in connection with this subcontract? A. Yes.
- Q. Now, Mrs. Cole, did anyone ever compensate you for acting as trustee on this joint control account? Were you ever paid for acting as trustee?

A. No, not at all.

The Court: What was the source of the money that went into this account upon which you drew checks?

The Witness: The payments from the job.

The Court: Was there first \$15,000 and \$10,000 deposited?

The Witness: \$25,000 was deposited.

The Court: That was the original source?

The Witness: That was the original source.

The Court: And thereafter payments from the job went into that account?

The Witness: Yes, your Honor.

- Q. (By Mr. Burford): Now, Mrs. Cole, during the time that you were connected with this particular subcontract, did you ever have anything to do with the personnel of White-Ahlgren Company, Inc., in connection with hiring or firing?
 - A. None at all. [45]

- Q. Did you ever attempt to exercise any such authority?

 A. I never did.
- Q. In connection with the payment of checks to the men working on the job where the individual payroll checks were made out, did you do that primarily at the office of the company at Pendleton?
- A. I didn't prepare the checks at any time. They were prepared when I arrived there. Who prepared them, I don't know.

The Court: Did you ever see any of the persons to whom these checks were made out?

The Witness: None at all. I saw them on the job but I never talked with them.

The Court: I mean, did you have a check made out to Juan Martinez and did you ever see anyone you knew as Juan Martinez?

The Witness: No, I did not, your Honor.

Mr. Burford: I believe that is all, your Honor.

Cross-Examination

By Mr. Sherman:

- Q. Mrs. Cole, I believe you testified that you acted as the agent for Century Indemnity Company in the writing of this bond, is that correct?
 - A. Yes.
- Q. And you were paid for your services in that regard, were you not?

 A. I didn't hear you.
- Q. You were paid for your services in that regard, were you not?

- A. I had a commission on the bond.
- Q. Yes? A. Yes.
- Q. And that was the payment for your services, was it not?

 A. That is right.
- Q. Now I believe you further testified that in connection with seeking the bond, the officers of the White and Ahlgren Company submitted a financial statement through you to Century Indemnity Company, is that correct? A. Yes.
- Q. The assets shown on that financial statement were all fixed assets, were they not, in the form of machinery and [52] equipment? A. No.
- Q. The financial statements submitted show that they had assets other than fixed assets such as machinery and equipment? A. Yes.
 - Q. What did it show in that regard?
- A. I don't remember the exact figures, but the current assets over and above the current liabilities were at least 10 per cent of the amount of the bond.

The Court: In other words, the bond was——

Mr. Sherman: \$540,000 or thereabouts, your Honor.

The Court: So their assets were approximately \$54,000, is that right?

The Witness: Yes.

* * *

By Mr. Sherman:

* * You say that the current assets exceeded the current liabilities by an amount of at least 10 per cent in excess of the amount of the bond.

Is that correct? [53] A. The current assets?

Q. Yes.

A. Not only the net assets, but the current assets were in excess of 10 per cent of the amount of the bond.

- Q. What do you define as current assets?
- A. Any monies or accounts receivable that can be liquidated in a short time.
- Q. I believe you further testified that you acted as trustee in behalf of The Century Indemnity Company with reference to this joint control account? A. Yes.
- Q. And it is also a fact, Mrs. Cole, that Century Indemnity Company required the opening of a joint control account as a condition to its writing of the bond? A. No.
 - Q. You are positive of that?
 - A. I am positive.
- Q. I believe you testified that it was at Mrs. Clausen's request that the joint control account was opened.
- A. It was a request that money be put in the job and I found no other solution except handling it through joint control.
- Q. And therefore it was for her protection then that the account was opened? A. Yes. [54]
- Q. In supervising the account you were to act as sort of protector for her monies?
 - A. I was supposed to act as disbursement agent.
 - Q. Did you ever consult with Mrs. Clausen with

reference to what disbursements from the trust account were to be approved or not approved?

- A. I called her a couple of times and she didn't seem to understand anything about business practices, so I discontinued calling her because she didn't understand business, what a joint control consisted of, apparently.
 - Q. So you had no further discussions with her?
- A. I had to use my best judgment. I felt a moral obligation to her.
- Q. Did you ever submit to her any accounting or statement as to what disbursements were approved from the joint account?
 - A. She understood that—
- Q. Would you please answer my question: Did you ever submit any such statements or accountings?
 - A. No.

The Court: Why didn't you?

The Witness: She was present at several meetings and she was there and she knew what was going on.

- Q. (By Mr. Sherman): Did you ever, Mrs. Cole, discuss with Mrs. Clausen [55] Plaintiff's Exhibit 36, this whole series of checks which did not contain your countersignature?
- A. As I remember, she was there when the matter came up.
 - Q. What do you mean by "there"?
 - A. She was at San Diego.
 - Q. Where?
 - A. At the office of White and Ahlgren.

- Q. She was at the office of White and Ahlgren when that came up, you say?
 - A. As I remember.
 - Q. What do you mean by the matter coming up?
- A. When these checks had been honored by the bank without any countersignature.
- Q. And you had a discussion at the office of White and Ahlgren concerning that?
- A. I had the discussion with Mr. White over the telephone first. Then the next day I went to San Diego.
 - Q. When was this?
- A. I don't recall the exact date. It is when I discovered that the checks were cashed without any countersignature.
 - Q. This was after you got the bank statement?
 - A. Yes.
- Q. Was Mrs. Clausen present at that conversation? [56]
- A. As I remember, she was. I am not positive, though.
- Q. Did you ever discuss directly with her what had taken place with regard to these checks from the point of view of the monies she had put in the joint control account?

 A. I don't remember.
- Q. As best you remember, did you not discuss it with her personally? A. I don't remember.
- Q. Mrs. Cole, I now hand you that which has been marked Defendant's Exhibit B for identification, and that purports does it not, to be instructions to the Security Trust and Savings Bank of

San Diego re White-Ahlgren Trust Account No. 1 under date of December 2, 1953, does it not?

- A. Yes.
- Q. And at the bottom thereof in the right-hand corner there appears to be what purports to be the signature of Eva L. Cole as attorney in fact for The Century Indemnity Company. Am I correct?

 A. Yes.
 - Q. Is that your signature? A. Yes.
- Q. Would you please, Mrs. Cole, refer to the second paragraph of these instructions and that second paragraph reads as follows, does it not: [57]

"The title to said account, and any balance that may be therein at any time is hereby vested and declared to be held by the aforesaid trustee and attorneys in fact of The Century Indemnity Company, as security to The Century. Indemnity Company that all funds to the credit of said account at any time shall be used solely for the purpose of paying bills for labor and material and all obligations entering into a certain construction project with reference to the completion of which said Century Indemnity Company has executed an indemnity bond."

Am I reading it correctly? A. Yes.

Mr. Sherman: Offer into evidence as Defendant's Exhibit B, your Honor.

The Court: May I see it?

(The exhibit referred to was passed to the Court.)

The Court: It is admitted.

(The document referred to was marked as Defendant's Exhibit B, and received into evidence.)

The Court: Is this Mr. Waite's signature appearing on there? [58]

The Witness: Yes, your Honor. The Court: Who is Mr. Waite?

The Witness: He is the manager of the bond department of The Century Indemnity Company.

The Court: In Los Angeles?

The Witness: In Los Angeles.

Q. (By Mr. Sherman): Mrs. Cole, Defendant's Exhibit B, these instructions to the bank, they were submitted to the bank, were they not, at the time the joint control account was opened?

A. Yes.

- Q. I now show you what has been marked Defendant's Exhibit C for identification, Mrs. Cole, and that is a power of attorney of The Century Indemnity Company?

 A. Yes.
- Q. And the power of attorney names you as an attorney in fact for The Century Indemnity Company, does it not? A. Yes.
- Q. And was this power of attorney submitted to the bank at the time the joint control account was opened?

 A. I don't remember.
- Q. You don't remember? A. No. [59] Mr. Sherman: Offer it into evidence as Defendant's Exhibit C, your Honor.

The Court: Let me see it.

(The exhibit referred to was passed to the Court.)

The Court: Any objection?

Mr. Burford: No objection.

The Court: Admitted.

(The document referred to was marked as Defendant's Exhibit C, and received in evidence.)

- Q. (By Mr. Sherman): Mrs. Cole, I now hand you Plaintiff's Exhibit 10 in evidence. That is the letter addressed to you by Mr. Oakes under date of March 23, 1954, which you have previously testified about?

 A. Yes.
- Q. This is the letter that was written to you at the time that there was difficulty in White-Ahlgren's meeting of its schedule of work performance? A. Yes.
- Q. And this letter refers, does it not, to a conference held in the offices of the Marine Development Company at which offices of Marine Development were present officers of White-Ahlgren, and the letter states you were present as [60] attorney in fact for The Century Indemnity Company, does it not?

 A. Yes.
- Q. I now hand you, Mrs. Cole, that which has been marked Plaintiff's Exhibit 24 for identification. That is a subordination agreement, is it not?

A. Yes.

- Q. Whereby Hertha A. Clausen subordinated any rights she had against White-Ahlgren for her loan to the rights of Century Indemnity Company?
 - A. In the amount of \$15,000, yes.
- Q. And was that subordination agreement executed by you as attorney in fact for The Century Indemnity Company? A. Yes.

Mr. Sherman: Offer into evidence as Defendant's Exhibit, your Honor. Our last exhibit in the pre-trial order is Exhibit T, so, perhaps, this should follow.

The Court: Well, it is marked No. 24 as a plaintiff's exhibit, so it can go in under that number. It doesn't make any difference.

Mr. Sherman: Very well.

The Court: It is admitted in evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 24, and received in evidence.) [61]

Q. (By Mr. Sherman): As a matter of fact, Mrs. Cole, all of these documents show, do they not, that you acted for Century Indemnity Company with reference to all your dealings with the White-Ahlgren Company, including the joint control account? A. Yes.

The Court: Did you negotiate and secure the execution of this Exhibit No. 24, this subordination agreement by Mrs. Clausen?

The Witness: Yes, your Honor.

The Court: You prepared it?

The Witness: It is a printed form.

The Court: I mean, there is some typing in here.

The Witness: Yes. She was in my office and I prepared it for her.

The Court: You had it typed in and submitted to her for signature?

The Witness: That is right, yes.

Mr. Sherman: Would you mark this?

The Clerk: Defendant's Exhibit U, marked for identification.

(The document referred to was marked as Defendant's Exhibit U for identification.) [62]

Q. (By Mr. Sherman): Mrs. Cole, I show you now that which has been marked Exhibit U for identification. That is a letter under date of January 8, 1954, addressed to the White-Ahlgren Company by yourself, is it not?

A. I didn't hear you; I am sorry.

Mr. Sherman: Would you read the question?

(Question read.)

The Witness: Yes.

The Court: Before you get onto that, in connection with this Exhibit No. 24, I notice that it is signed "Contractor," and typed in "White-Ahlgren Company, Inc., W. T. Ahlgren, President," which is typed underneath the signature, and "Creditor," and the signature Hertha A. Clausen, but over on the left side it says "Witness," and

the signature Hertha A. Clausen, and Secretary-Treasurer.

Mr. Sherman: I will come to that in my examination, if your Honor wishes to wait.

The Court: We are here now.

Why did she sign that as secretary and treasurer? Was she secretary and treasurer of the White-Ahlgren Company, or how did you happen to write that in there?

The Witness: On the 2nd day of December, 1953, when I went to the office of the White-Ahlgren Company to bring the bond, I told them at that time that the application had to be [63] signed by a president and attested by the secretary.

They had no secretary. I told them that they had to have one. So they appointed Mrs. Clausen as secretary-treasurer.

The Court: Right then?

The Witness: Right then.

The Court: Did they fire her right then, or did she continue, or do you know?

The Witness: I don't know.

The Court: There wasn't any resolution of the Board of Directors?

The Witness: They claimed they had one.

The Court: Very well.

- Q. (By Mr. Sherman): This letter, Mrs. Cole, dated January 8, 1954, that you have in your hands, that was written by you to the White-Ahlgren Company, was it not? A. Yes.
 - Q. And that letter refers, does it not, to things

that The Century Indemnity Company might require you to do in connection with the joint control account?

- A. May I have the time to read it, please?
- Q. Certainly.
- A. (Examining document): Yes.

Mr. Sherman: Offer it into evidence as [64] Defendant's Exhibit U, your Honor.

The Court: Let me see it.

(The exhibit referred to was passed to the Court.)

The Court: It is admitted.

(The document referred to was marked as Defendant's Exhibit U, and received in evidence.)

- Q. (By Mr. Sherman): Now, Mrs. Cole, with reference to Mrs. Clausen's appointment as secretary-treasurer of the White-Ahlgren Company, did I understand that that took place at the time that the bond was executed and the joint control account was opened?
- A. I believe it was the same day, as far as I can remember.
- Q. Now, was the application for bond also executed at the same time?
- A. I don't remember. An application was submitted earlier when a Mr. Curtis was secretary of the company at that time, but I don't know whether

I took another application as of the date of the bond.

Q. Now, Mrs. Cole, I show you Plaintiff's Exhibit 2 in evidence.

That is the application for bond that you [65] previously testified about, is it not? A. Yes.

- Q. On Page 4 thereof, it is signed by Hertha Clausen as secretary, is it not? A. Yes.
- Q. And the date of this bond is October 6, 1953, is it not? A. The application.
- Q. The application—pardon me—the date of this application is October 6, 1953?

 A. Yes.
- Q. Yet if Mrs. Clausen was not appointed secretary-treasurer until the date the bond was executed, was then not this application executed not on October 6, 1953, due at the time the bond was written in December of 1953?
 - A. I don't remember.
- Q. As a matter of fact, Mrs. Cole, all of these papers, the bond, the subcontract and the application for bond, were all actually executed at the time the joint control account was opened, is that not correct?

The Court: All except the application, did you say?

Mr. Sherman: No. I said all of them, the subcontract, the bond and the application for bond were all actually executed in December when the joint control account was opened. [66]

- Q. Is that not correct?
- A. That is possible; I don't remember.

- Q. Now, Mrs. Cole, the subordination agreement that you testified about, Plaintiff's Exhibit 24, was that not required by The Century Indemnity Company?

 A. Yes.
- Q. As a matter of fact Mrs. Clausen's loan to the company in the amount of \$15,000 went directly into the joint control account, did it not?
 - A. Yes.
- Q. And Mr. Earl Grandy also made a loan to White-Ahlgren, did he not? A. Yes.
 - Q. In the amount of \$25,000? A. Yes.
- Q. And that also went into the joint control account, did it not? A. Yes.
- Q. At the time the joint control account was opened, the contractor, Marine Development Company, also deposited \$10,000 into the joint control account, did it not?

 A. Yes.
- Q. And that made up the balance of the original \$25,000 deposited, did it not? A. Yes. [67]
- Q. Mrs. Clausen's \$15,000 and Marine Development's \$10,000? A. Yes.
- Q. And Marine Development's \$10,000 was an advance on the progress payment, is that correct?
 - A. Yes.
- Q. Now before the joint control account was set up, did you discuss with Mr. Waite or Mr. Ahlgren the source of the monies that were to be put into the joint control account?
 - A. I don't remember.

The Court: You testified yesterday that you had discussed with them, one or the other, the proposi-

tion that they didn't have sufficient assets to write the bond and that one of them came to your office and said he knew somebody who would loan them the money and they brought the woman in?

The Witness: Yes.

The Court: So then you must have discussed it.

The Witness: I discussed the amount needed that the bonding company required, and then they asked me whether if someone loaned money.

The Court: Then the answer to the last question should be changed, should it not?

Read that last question.

(Record read.) [68]

The Witness: The source is what I don't remember about.

The Court: Didn't you testify that they brought Mrs. Clausen in, and she said she was going to loan them \$15,000?

The Witness: Not first, your Honor, I didn't know what the source was. I thought that is what counsel was referring to.

The Court: What do you mean by the source?

The Witness: He wanted to know—He asked me where the source of the money came from. I didn't know.

The Court: It came from Mrs.—

The Witness: Clausen and——

The Court: He isn't asking you where Mrs. Clausen got it, he is asking you who it came from

to go to White-Ahlgren, the source. It was Mrs. Clausen's \$15,000, wasn't it?

The Witness: Yes, and another \$10,000 was supposed to be put in. I didn't know the source of that one.

The Court: You didn't know that the Marine Development put it in?

The Witness: Until the last minute I didn't know.

The Court: But you did know that Mrs. Clausen was going to put in \$15,000?

The Witness: I knew that.

The Court: And you had discussed that with the officers of White-Ahlgren?

The Witness: Yes. [69]

Q. (By Mr. Sherman): Mrs. Cole, I now hand you that which has been marked Defendant's Exhibit A for identification.

That purports to be a letter under date of November 16, 1953, addressed to Marine Development, Inc., and signed by D. J. Waite, attorney in fact of The Century Indemnity Company, is it not?

- A. Yes.
- Q. Have you ever seen this letter before?
- A. No, except I saw it when Mr. Deibert showed it to me.
- Q. Have you ever seen this letter prior to the time that the joint control account was opened?
 - A. I don't remember it.
- Q. As best you recall, did you or did you not see it? A. I did not see it.

- Q. Did you ever discuss this letter or its contents with any member or officer of the White-Ahlgren Company before the joint control account was opened up?

 A. I don't remember.
- Q. The best of your recollection is that you did not?
 - A. I did not, as far as I can remember.
- Q. Now that letter requires the opening of a joint control account as a condition precedent to Century Indemnity [70] Company's writing of the bond, does it not?

 A. Yes.
- Q. So this is a condition, the opening of the joint account is a condition, according to this letter before Century will write the bond, is that correct?

A. I think so; I am not sure.

The Court: It calls for a conclusion, Counsel.

Mr. Sherman: Yes.

I offer into evidence Defendant's Exhibit A, your Honor.

The Court: Any objection?

Mr. Burford: No objection.

The Court: It is admitted.

(The document referred to was marked as Defendant's Exhibit A, and received in evidence.)

Q. (By Mr. Sherman): Now, if I understood your testimony correctly, you did not know the Marine Development Company was to put in \$10,000 into the joint control account until it was actually done? A. No.

- Q. Is that correct? A. Correct.
- Q. Do you know who deposited the initial [71] Marine Development \$10,000 check into the joint control account?
- A. It was brought to me the morning that the account was opened.
 - Q. That was the first you knew about it?
 - A. That is right, as far as I can remember.
- Q. And you deposited it into the joint control account? A. Yes.
- Q. And thereafter did you deposit the checks of Marine Development Company into the joint control account?
- A. Most of those checks were mailed direct to the bank.
 - Q. Did you ever deposit any of them yourself?
- A. I believe once or twice they were handed to me and I mailed them to the bank, or took them to the bank, I don't remember.
- Q. You are positive that you handled them once or twice? A. As far as I can remember, yes.
- Q. Now with reference to Plaintiff's Exhibit 36, which are these checks which do not contain your countersignature, they covered a relatively short period of time, did they not, just a few weeks?
 - A. I don't remember.
 - Q. The first one is dated December 18, 1953? [72]
 - A. Yes.
 - Q. And the last one is dated January 7, 1954?
 - A. Yes.
 - Q. Now you testified, I believe, that you okayed

those checks after you got the bank statement in February, is that correct?

- A. I don't recall the date.
- Q. It first came to your attention after you got the bank statement in February? A. Yes.
- Q. That is when you first discussed it with Mr. Frazier, is that not correct? A. Yes.
- Q. Mrs. Cole, I now hand you Plaintiff's Exhibit 25. This is the letter you testified about wherein after the matter came to your attention you ratified the issuance of these checks?
 - A. (Examining exhibit): Yes.
- Q. Now that letter is dated January 15, 1954, is it not? A. Yes.
- Q. And that was before you got the bank statement in February, was it not?
- A. The letter was written after I had received the bank statement. [73]
 - Q. You mean the letter was backdated?
 - A. No. sir.
- Q. Can you then tell us how the letter was dated January 15, 1954?
- A. Then I must have received the bank statement prior to that date.
- Q. You received the bank statement prior to January 15, 1954? A. Yes.
 - Q. For the month of January?
- A. That is what I had before me. That is the first inkling I had that checks were cashed without any countersignature.

The Court: Well, here is a check dated January

12th. It seems to be the latest one. Did you have some arrangement with the bank where you would get bi-monthly statements?

The Witness: I don't remember, your Honor, but I did get the bank statement prior to this letter.

- Q. (By Mr. Sherman): As a matter of fact, Mrs. Cole, isn't it true that Mr. Waite discussed these checks with you before you got any bank statement at all?

 A. No, sir.
- Q. Now in connection with these checks, Mrs. Cole, isn't it true that you left trust account checkbooks with the [74] White-Ahlgren bookkeeper, Mrs. Higgins, to enable her to write checks on the trust account?
 - A. I don't understand your question.

Mr. Sherman: Perhaps we can have the reporter repeat the question.

(Question read.)

The Court: You mean signed by Mrs. Cole in blank?

Mr. Sherman: No.

- Q. Did you leave blank checkbooks, checkbooks on the trust account, did you leave such blank checkbooks with Mrs. Higgins, the White-Ahlgren bookkeeper, in order to enable her to write out checks against the trust account?
- A. I didn't leave them. There were more than one book and they only gave me one.
- Q. My question is whether you gave her any such checkbooks? A. I did not.

The Court: When you finally countersigned the checks, the practice was for her to draw the checks and send them to you?

The Witness: That was the general practice.

The Court: So she had to have possession of the checks?

The Witness: Yes, she had one checkbook and I had one also. [75]

- Q. (By Mr. Sherman): Now I believe you further testified in connection with the checks drawn on the trust account that any checks okayed by White-Ahlgren you automatically countersigned, is that correct?

 A. Correct.
- Q. You did not act in the way of approval or disapproval of any checks they wanted, if they okayed it you okayed it but they had to okay it first, is that correct? A. Yes.

Mr. Sherman: May we have this marked Defendant's Exhibit V for identification, please.

(The document referred to was marked as Defendant's Exhibit V for identification.)

- Q. Mrs. Cole, I now hand you what has been marked Defendant's Exhibit V for identification. Those are checks Nos. 386 through 394 on the trust account in blank bearing only the signature of Albert C. White, is that correct?

 A. Yes.
- Q. Is it not a fact, Mrs. Cole, that these blank checks signed in blank by Albert C. White were given by him to you at your request so that you could write further checks against the trust account

without any further approval of the White-Ahlgren Company?

- A. As I remember it, it was for the purpose of paying [76] off employees in a hurry when they needed some checks fast. I don't remember these checks at all.
- Q. When you say you don't remember these checks at all, do you recall that you had these checks in your possession?
 - A. I don't remember it.
- Q. Well, then, how do you know what they were for?
- A. If they left me some checks it was for that purpose, as I remember it.
- Q. You don't remember whether they did or not, but if they did leave them you know why they left them, is that the idea?
 - A. I don't remember really.
- Q. Now as a matter of fact, if these checks were given to you in that form you would write checks without any further approval of the White-Ahlgren Company?

The Court: That is speculative, Counsel.

Mr. Sherman: Very well, your Honor.

We will offer them in evidence as Defendant's Exhibit V.

The Court: Admitted.

By the way, there doesn't appear to be any foundation laid for them. If there is no objection they may be admitted. I don't know where they came from or is there any showing here as to where

they came from or how or why or when White signed [77] them or who had them.

Mr. Burford: If your Honor please, we haven't seen these before. I have no objection to them being admitted with the condition that a foundation be laid by Mr. White when he testifies.

Mr. Sherman: Very well, your Honor.

The Court: The objection will be sustained at this time; there is no foundation laid.

- Q. (By Mr. Sherman): Now, Mrs. Cole, when you discussed these checks with Mr. White I believe you said—was it he who promised that the trust account would be reimbursed?
 - A. No, it was Mr. Ahlgren.
 - Q. Mr. Ahlgren? A. Yes.
- Q. But you were promised that the trust account would be reimbursed, is that correct?
 - A. Yes.
- Q. Now at that time the White-Ahlgren Company——

The Court: The trust account?

The Witness: Yes, your Honor.

Mr. Sherman: Yes, your Honor.

The Court: Well, the first account apparently was White-Ahlgren Account No. 1.

Mr. Sherman: That is the trust account, your Honor. [78]

The Court: The name of it was White-Ahlgren Account No. 1. According to this letter of January 15th, it states:

"So as to eliminate such a future possibility, I

have suggested and recommended to White-Ahlgren Company, Inc., that they open in your bank a payroll account under the name of White-Ahlgren Trust Account No. 1, over which I will have no control * * *"

Now let me see the checks. I think they are on the White-Ahlgren account.

Mr. Sherman: May I make an explanation?
The Court: Are these Trust Account No. 1?

(The exhibit referred to was passed to the Court.)

The Court: The exhibit here which you have produced is not the one I had in mind. Where are the instructions to the bank? There is another document there, Mr. Clerk, that was handed up this morning, instructions to the bank or a power of attorney.

Mr. Sherman: I believe I can clarify that matter for the Court.

The Court: Here it is.

Mr. Sherman: The joint control account actually opened was known as the White-Ahlgren Trust Account No. 1. All evidence so far has been pertaining to that joint control [79] account.

The reference in the letter of January 15th by Mrs. Cole that another, a second and separate account be opened with that name, no evidence has been introduced as of this point that any such account was ever opened, and therefore all references to date to White-Ahlgren Trust Account No. 1 per-

tains to the joint control account that was opened.

This was a suggestion of Mrs. Cole's in a letter in which she used the same appellation for an account which she recommended, but there is no evidence so far that such a further account was ever opened.

Your Honor will note that the letter itself refers, after the opening "Dear Mr. Frazier; re: White-Ahlgren Trust Account No. 1," so the account was in existence at that time.

The Court. Let me see the cards.

(The exhibits referred to were passed to the Court.)

The Court: I see the White-Ahlgren Trust Account No. 1, and this is the statements which show White-Ahlgren Trust Account No. 1. This is May of 1954.

Mr. Sherman: I think your Honor will see from the opening sheet that it was opened December 2, 1953.

The Court: Yes. Very well.

Well, then, do you know whether or not as a matter [80] of fact White-Ahlgren Company opened another and separate account than the one which had theretofore been carried under the name of White-Ahlgren Trust Account No. 1?

The Witness: I don't know. I asked that a payroll account be opened.

The Court: Did they open a payroll account?

The Witness: No, they did not, as far as I know. I don't know.

- Q. (By Mr. Sherman): They did, Mrs. Cole, though have their own company account?
 - A. I didn't know that.
- Q. You wrote checks payable to the company, did you not?
- A. I made checks payable to that account, but I don't know what they did with it. I don't know if they opened an account or not.

The Court: You made checks payable to what account?

Mr. Sherman: Made payable to White-Ahlgren Company, I believe she testified, your Honor.

The Court: Are those checks going to come in evidence so that we can see without guessing who they were made to?

Mr. Sherman: Well, I don't know if plaintiff intends to introduce them or not. They have possession of them.

The Court: Very well. Go ahead. [81]

- Q. (By Mr. Sherman): Now, Mrs. Cole, at the time that the bond was written it was written in connection with this job at Camp Pendleton, was it not?

 A. Yes, sir.
- Q. Now at that time the White-Ahlgren Company, under the name of Wright-Ahlgren Company also had a job with Webb & Knapp at Claremont Gardens, did it not?
 - A. I understood so. I don't know for a fact.
 - Q. Didn't you write insurance for that job?

- A. I don't remember that I did.
- Q. You didn't write the Workmen's Compensation insurance for that job?
- A. I wrote Workmen's Compensation after this job started and it covers all jobs, so I wouldn't know which job it covered.
- Q. Didn't you write Workmen's Compensation for them before this Camp Pendleton job started?
- A. I don't remember if I did. If I did, I don't remember.
- Q. Isn't it a fact, Mrs. Cole, that after the Camp Pendleton job started you entered into an agreement with the White-Ahlgren officers that monies in the joint control account could be used to pay the costs of the Webb & Knapp job? [82]
 - A. No, sir.
- Q. Wasn't it the plan, Mrs. Cole, that in return for allowing the use of such monies to be drawn against the trust account, any amounts which Wright-Ahlgren received on the Webb & Knapp job were to go into the trust account to help pay the costs of the Camp Pendleton job?
 - A. I don't remember anything about that.
- Q. Is it your testimony that to the best of your recollection there was no such plan?
 - A. There was no such plan.

Mr. Sherman: May I have Defendant's Exhibit J.

(The exhibit referred to was passed to Counsel.)

- Q. (By Mr. Sherman): Mrs. Cole, I show you a check which has been marked Defendant's Exhibit J for identification. Now that is a check made payable to the Director of Internal Revenue in the amount of \$10,397.71, under date of February 17, 1954, is it not? A. Yes.
- Q. And that check bears your signature as trustee, does it not? A. Yes.
- Q. Did you actually write this check out before signing it?
 - A. I don't remember that. It is possible. [83]
 - Q. The check is typewritten, is it not?
 - A. Yes.
- Q. Was it your practice when you wrote checks against the trust account to typewrite those checks?
 - A. I don't remember.
 - Q. You did countersign the check anyway?
 - A. Yes, I did.
 - Q. What was the purpose of the check?
 - A. I don't know.
- Q. You countersigned a check for \$10,000 and you don't know what it was for?
- A. They said they owed it to the Internal Revenue.
- Q. Did they say what they owed the Internal Revenue for?

 A. I understood it was taxes.
 - Q. Taxes for what?
- A. I don't know. I took their word for it. That was my agreement. They were supposed to approve the payment and I was supposed to countersign any check they presented to me if they approved it.

- Q. So you countersigned this check for \$10,000 without knowing anything further about it other than it was for taxes, is that correct?
 - A. Yes.
- Q. As a matter of fact, you knew this check went to pay [84] taxes owing on the Webb & Knapp job, did you not?

 A. I did not know.
- Q. As a matter of fact, wasn't this check written in order to allow the job to continue and for White-Ahlgren to get its payment out of the Webb & Knapp job?

 A. I didn't know that.

Mr. Burford: I object to that, your Honor. It is speculative.

Mr. Sherman: I am asking this witness if she knew.

The Court: She said she did not know.

- Q. (By Mr. Sherman): But you allowed a check to be drawn against the trust account for payment of taxes, that much you knew?
 - A. Yes, sir.
- Q. I believe you further testified, did you not, that the only——

The Court: When this was presented to you for payment, was there any kind of a return with it, a government form, showing that it was for payroll tax, withholding tax, income tax, excise tax—I don't know how many other kinds of taxes there are, but there are plenty of them.

The Witness: Mr. White told me that they had to have this money immediately to pay the taxes to the United States Government.

The Court: In connection with the job covered by your [85] bond or did he mention anything about that?

The Witness: He didn't mention anything about it.

The Court: He just said he had to have it immediately to pay taxes?

The Witness: That is right.

The Court: All right.

Q. (By Mr. Sherman): Now, Mrs. Cole, I believe you testified that the original plan with reference to payment of payroll on the Camp Pendleton job was for you to receive from White-Ahlgren a payroll recap and you would then issue a check to them in the gross amount, is that correct?

A. Yes.

The Court: I think she testified that the custom was for her to telephone her and she would write the check and she would then send her a confirmation.

Mr. Sherman: In the gross amount.

The Court: In the gross amount?

The Witness: Yes, sir.

Q. (By Mr. Sherman): As a matter of fact, didn't that practice of issuing checks in the gross amount stop in January?

A. I don't remember the date, but it stopped.

The Court: You testified yesterday that that continued until the latter part of March, then you signed individual [86] checks for the payroll.

The Witness: As I remember, it was in March.

Q. (By Mr. Sherman): Isn't it true, Mrs. Cole, that commencing in January the practice was changed and you issued checks only in the net amount to the payroll until you started individual checks in March?

A. I don't remember that.

The Court: Net amount? By that you mean the net due each individual after deducting unemployment insurance, and so on?

Mr. Sherman: Yes, your Honor.

The Court: Or by that do you mean net individual checks as against gross payroll?

Mr. Sherman: I mean, your Honor, checks after deducting the appropriate taxes, the actual checks which the individual employee received.

The Court: Let us first find out when she started the practice of signing individual checks, then find out what those checks were for.

The Witness: As I remember it, it was in March.

Q. (By Mr. Sherman): That you started signing the individual checks?

A. Yes.

The Court: Now on those individual checks, did they have [87] anything up in the corner or on the back or a voucher with them that showed the gross amount due, less withholding tax, less income tax, Social Security tax, and so on?

The Witness: I never noticed it, your Honor.

The Court: Were they big checks with a voucher at the bottom? You know what I mean.

The Witness: No, they were checks like those.

The Court: They were checks this size (indicating)?

The Witness: That is right.

The Court: And when they submitted the list to you—I see these checks are in varying amounts, \$64.71, \$91.60, \$73.60—when they submitted this itemized list of individual checks to whom the checks were drawn, did they have a tabulation there showing the total amount due the individual and the deductions which the employer is required to make?

The Witness: On this recap they sent me was the net to the employee, and the taxes, withholding and what not, and I sent them the money for the whole amount, not only for the net but also for the withholding and the unemployment and what have you.

The Court: Everything?

The Witness: Yes.

The Court: Do you have one of those?

Mr. Sherman: I was going to get one.

The Court: Very well. [88]

When you started issuing the individual checks as distinguished from the gross amount—

The Witness: That was, as I remember it, in March.

The Court: But whenever it was that you did do so, before you issued those individual checks I take it that you had a list from them of the names of the persons to whom the money was due?

The Witness: Your Honor, the checks were all prepared when I arrived at their office.

The Court: You would go to their office once a week?

The Witness: I would go to their office once a week, to San Diego, and I would go for that purpose.

The Court: Did they give you any list showing the amount, the gross amount and the deductions and the withholdings?

The Witness: None whatsoever.

The Court: So all you did was—they presented you checks and you just signed them?

The Witness: Yes, sir.

The Court: You don't know whether the amounts you signed for included or did not include withholding taxes?

The Witness: I wouldn't know, your Honor.

The Court: Did you ever have any auditor go down and go into their books to see the status of their accounts with the government on the withholding and employment taxes and Social [89] Security?

The Witness: I had asked them that an auditor be appointed. They had no CPA and they had asked me whether I knew of an auditor and, as I remember it, I talked with Mr. Waite about it and since there was a man we knew, both Mr. Waite and myself knew, that auditor was located in Laguna Beach, and I knew he was a responsible man, and so did Mr. Waite.

We mentioned his name and suggested his name, but we didn't recommend that they take him, we just happened to know the man, and they hired the man, Mr. Hoover, Rex Hoover, who is a public accountant.

The Court: They hired him?

The Witness: Yes. We had nothing to do with hiring him.

The Court: When was that?

The Witness: That was sometime, as I remember it, the latter part of March.

The Court: Then did he send any report to you or, so far as you know, to anyone in The Century Indemnity Company showing the status of their books and accounts with relation to the amount of money that was due or owing or had been paid or was held on hand by them in connection with any of these taxes?

The Witness: By the time Mr. Hoover went there the job was in trouble and it was out of my hands.

The Court: I see. [90]

- Q. (By Mr. Sherman): Mrs. Cole, I hand you that which has been marked Defendant's Exhibit W for identification. Now is that an example of the type of payroll recap that was furnished to you?
 - A. Yes, sir.
- Q. I hand you that which has been marked Defendant's Exhibit X for identification. Is that another example of the type of payroll recap fur-

nished to you? A. Yes, sir.

The Court: What date?

Mr. Sherman: It is a payroll recap for the week ending January 18, 1954. That is Exhibit W, your Honor.

Exhibit X is the payroll recap for the week ending January 25, 1954.

The Court: Let me see them.

(The exhibits referred to were passed to the Court.)

The Court: You did receive these documents? The Witness: Yes, your Honor.

The Court: Now when you received these was this during the period that you were issuing the gross checks?

The Witness: Yes, your Honor.

The Court: Very well. They are received in evidence.

(The documents referred to were marked as [91] Defendant's Exhibits W and X, respectively, and received in evidence.)

Mr. Sherman: May they be returned to the witness, Mr. Clerk?

(The exhibits referred to were passed to the witness.)

Q. (By Mr. Sherman): Mrs. Cole, would you look at Exhibit W, please, which is the payroll for

the week ending January 18, 1954. A. Yes.

- Q. On page 2 thereof under the column "Gross" is the total figure, \$4,966.41. Am I correct?
 - A. Yes.
- Q. And under the column "Deductions" is the figure \$594.98. Am I correct.

 A. Yes.
- Q. And under the "Net figure" the total dollar figure \$594.98. Am I correct? A. Yes.
- Q. Now with reference to the payroll for that week, the week ending January 18, 1954, did you issue a check in the amount of the gross, which is \$4,966.41 or in the amount of the net, \$4,371.71?
 - A. Evidently I sent them the net on that week.
 - Q. You gave them only the net? [92]
 - A. That particular week.
 - Q. The week of the 18th? A. Yes.
- Q. Would you turn to Exhibit X, which is the payroll for the week ending January 25, 1954?
 - A. Yes.
- Q. Would you turn to the second page there and would you look at the figure under "Gross" and would you look at the figure under "Net"?
 - A. Yes.
- Q. Tell us whether for that week's payroll you issued a check in the amount of the gross or the amount of the net.

 A. I don't remember.
- Q. Do you note on the bottom thereof in hand-writing the words "Check No. 133 Paid 1-29-54"?
 - A. Yes.
 - Q. Is that your handwriting?
 - A. Yes, it is.

Q. Is it your testimony that Check No. 133 was the check issued to pay the payroll for that week?

A. Yes.

The Court: What week is that?

Mr. Sherman: January 25th.

The Court: This White-Ahlgren Trust Account No. 1 doesn't show any money going into that bank account during the [93] month of January.

Mr. Sherman: Yes, it does.

The Court: It shows \$25,000 originally but on those dates it doesn't show any money.

Mr. Sherman: That is correct, because the check would have cleared thereafter. But let me proceed in that fashion.

The Court: Well, January 18th, it would have cleared before February 1st, would it not?

Mr. Sherman: I have them identified for the Court, and may we establish it through the witness, your Honor?

May we hand the witness, Mr. Clerk, Defendant's Exhibits D and E for identification.

(The exhibits referred to were passed to the witness.)

The Court: Is that another account?

Mr. Sherman: Yes, that is the general account to which account the check was supposed to have been issued.

The Court: Let me see it.

(The exhibit referred to was passed to the Court.)

Q. (By Mr. Sherman): Now, Mrs. Cole, would you please look at Exhibit D for identification. That shows that these are the bank ledger sheets of the White-Ahlgren Trust Account No. 1. The first page may be a little blurry but I think the balance of the [94] pages show it. Is that not correct?

The Court: Well, that is what it was admitted in evidence for, as indicating whatever the first date is.

Mr. Sherman: I don't think they have been offered yet. They are still marked only for identification.

The Court: Very well.

- Q. (By Mr. Sherman): Now would you turn to the reverse of the first page, Mrs. Cole, the one that commences with the entry January 7, '54. Do you see that? A. Yes.
- Q. That shows that this is the White-Ahlgren Trust Account No. 1, does it not? A. Yes.
- Q. Now would you look, Mrs. Cole, on the first left-hand column under the date February 15, 1954. Do you find that? A. Yes.
- Q. Next to that in the checks issued column do you find the figure \$3,282.54?

 A. Yes.
- Q. Would you please look at Exhibit W. Is that the exact amount of the net for the week ending January 25th?

 A. W is 4,966.
 - Q. I mean the X rather than W.
 - A. Yes. [95]
 - Q. That is the exact amount?

The Court: You mean they got it in the wrong column?

Mr. Sherman: No, your Honor. This check cleared the bank on February 15, 1954.

The Court: Let me see it. I don't understand it.

(The exhibit referred to was passed to the Court.)

The Court: Oh, it cleared it in February.

Mr. Sherman: It cleared the trust account in February, February 15, 1954.

Your Honor will bear in mind this was the payroll ending January 25th, which was paid after that week, and by the time it cleared the bank it was February 15th.

I think I can tie this up by the other things I have in my mind.

If your Honor will look under February 15, 1954, your Honor will see the amount of \$3282.54 clearing the bank on that date, which is the exact amount of the net for the payroll period ending January 25, 1954.

- Q. Now, Mrs. Cole, would you please look at Exhibit E for identification. That is the bank ledger sheet of the White-Ahlgren Company account, is that not correct? A. Yes.
 - Q. That was the White-Ahlgren own account?
 - A. I suppose so. [96]
- Q. Would you look on page 5 and would you look in the deposit column under the date of February 15, 1954, is that not the amount of \$3282.54?

A. February 15th?

Q. Yes, in the deposit column, which is the third column from the right-hand side.

A. (Examining exhibit.)

Mr. Sherman: Your Honor, apparently it didn't come out on this photocopy and therefore at this time I would like to substitute for this photocopy Exhibit E the one I have been working from.

The Court: Very well.

Mr. Sherman: Your Honor will see under date of February 15, 1954, the deposit which I have circled.

The Court: Yes, I see it.

In other words, the course of the check was out of the trust account into the——

Mr. Sherman: General account.

The Court: ——general account.

Mr. Sherman: And from which they were to disburse the wages, and my point to the witness is—

The Court: Did they, in fact, disburse the wages from that account? Is that your position?

Mr. Sherman: No. My point is that the amount transferred to these people was not the gross amount, including the amount [97] of taxes, as this witness has testified, but that commencing in January it was changed to the transfer only of the net amount and the White-Ahlgren Company did not receive the taxes; it merely received the amount of salary less taxes, and this witness has testified that this wasn't the practice and that the gross was paid until individaul checks were signed in March.

The Court: I am just inquiring. I suppose it will come out in the testimony.

After this was done did White-Ahlgren draw the individual checks to the employee?

Mr. Sherman: Yes, your Honor.

The Court: Out of their general account?

Mr. Sherman: Yes, your Honor. The books scindicate.

The Court: In other words, they ceased paying their employees out of the trust account?

Mr. Sherman: But only for a few weeks, as I tried to bring out from the witness.

The Court: She ceased at the end of January.

Mr. Sherman: The beginning of January or for a few weeks it occurred, and then after that they paid directly to the White-Ahlgren Company who then paid their employees and my point at this time, your Honor, is that commencing in January the amounts transferred were not gross but net less the taxes.

The Court: All right. And your contention is that that [98] continued for how long?

Mr. Sherman: It continued until March when they commenced actually writing the individual checks at the job site.

You see, your Honor, the procedure was in the beginning that they were to write the gross. Then this was changed in January and they merely transferred the net. Then commencing in March there was no longer a transfer of funds to White-Ahlgren from which they were supposed to pay the employ-

ees, but commencing in March checks were issued directly against the trust account and countersigned directly at the job site by The Century trustee.

The Court: Deductions being made from the individual employee?

Mr. Sherman: Yes. In other words, commencing in January, your Honor, the deductions did not——

The Court: Commencing in March when they paid the checks to the individual employee, and it was countersigned on the job by a representative of Century Indemnity, it is your contention that they paid only the net amount due that employee and withheld all of the taxes concerning which this claim is involved?

Mr. Sherman: That is correct. It is a further point that this procedure was also followed insofar as withholding the tax amounts as early as January, that as early as January when [99] transfers were made to White-Ahlgren.

The Court: I understand that.

Mr. Sherman: Very well.

- Q. Now, Mrs. Cole, does that refresh your recollection that you would issue net checks instead of gross checks?
- A. After they had drawn checks which were not countersigned by me apparently, that is what I did. I didn't remember it, though.
- Q. Now you testified that this procedure was changed to drawing individual checks against the trust account at the job site in about March.
 - A. As I remember it, yes.

Q. Didn't that occur at the time that Mr. Oakes sent you this letter informing you of White-Ahlgren's default in the matter?

A. I don't remember the exact date.

The Court: Well, in March, I understood a little while ago that things were taken out of your hands.

The Witness: The latter part of March.

The Court: In the latter part of March?

The Witness: Yes, your Honor.

The Court: By some officials of Century Indemnity and you had nothing more to do with the job or the disbursement of funds?

The Witness: I had something to do until the whole job was [100] taken over by the legal department of Century Indemnity. I went there a couple of times.

The Court: I mean about countersigning checks, and so on.

The Witness: I did countersign a few checks after that.

The Court: After they took it over?

The Witness: Yes.

The Court: All right.

- Q. (By Mr. Sherman): Now, Mrs. Cole, before they took it over, this letter that Mr. Oakes sent you was sent to you, was it not? A. It was.
- Q. That was before they took it over. Now before they took it over you started the practice of going down to the job site once a week and signing the individual payroll, countersigning the individ-

(Testimony of Eva L. Cole.)
ual payroll checks? A. Yes.

- Q. Now my question is this: You commenced that practice of going down to the job site and signing the individual payroll checks at about the same time that Mr. Oakes sent you the letter advising you that White-Ahlgren was behind in its work schedule?

 A. Approximately.
- Q. Now is it my understanding that your testimony is that after you commenced issuing individual checks at the job [101] site no further payroll recaps were furnished to you?

A. Yes, no further recaps were made to me.

The Court: Let me get this clear again.

After you received this letter, which is Exhibit 10, a letter from Oakes & Horton, and which changes the schedule of the apparent completion dates of the work, you then changed the practice which you had theretofore followed and went to San Diego each week?

The Witness: Yes, your Honor.

The Court: You went on the job site and signed checks which had been prepared by the White-Ahlgren bookkeeper?

The Witness: Either at the job site or their office.

The Court: One or the other?

The Witness: Yes.

The Court: You signed checks which had been prepared by the bookkeeper?

The Witness: Yes, your Honor.

The Court: And at that time, if I understand

you correctly, no schedule such as Exhibits W and X giving the individual names, the hours, the rate, the gross, the deductions and the net, were presented to you?

The Witness: As I remember it, none were presented to me.

The Court: Was any total amount given you, the total payroll?

The Witness: No, I don't recall of any. [102]

The Court: How did you know that the money was going to these people? How did you know that there wasn't a lot of phony names?

The Witness: The purpose of the controller, as I pointed out yesterday, was purely to disburse the funds in accordance with the instructions of the contractor. They are supposed to present the check to me, Mrs. Clausen was satisfied that they were a good risk, she was loaning the money, and as far as the bond is concerned the bonding company expected White-Ahlgren to use their own funds to finance the job, not only the small amount of money that was deposited, they were supposed to finance the job to the extent of about \$50,000 of their own money.

The Clerk: Defendant's Exhibit Y has been marked for identification.

(The document referred to was marked as Defendant's Exhibit Y for identification.)

Q. (By Mr. Sherman): Mrs. Cole, I now hand you that which has been marked Defendant's Ex-

hibit Y for identification. That purports, does it not, to be payroll recaps for the weeks ending respectively April 12, 1954?

A. Yes.

- Q. April 19, 1954? A. Yes. [103]
- Q. And April 26, 1954? A. Yes.
- Q. Is that correct? A. Yes.
- Q. And each of those payroll recaps are signed by an officer of the White-Ahlgren Company certifying that that is the true and correct amount of payroll for the particular week, is that correct?
 - A. Yes.
- Q. Do each of those payroll sheets bear in the upper left-hand corner the name of Eva Cole? You can take it apart, Mrs. Cole.
 - A. (Examining exhibit.) Yes.
- Q. And were not those payroll recap sheets furnished to you?
 - A. I suppose so. I don't remember.
- Q. Were they not furnished to you after you commenced the practice of signing individual checks at the job site?
 - A. Possibly. I don't remember them, though.
 - Q. You don't remember them? A. No.

Mr. Sherman: At this time, your Honor, we would like to go back a little and offer into evidence Defendant's Exhibits D and E, which are the bank ledger accounts of the two bank [104] accounts.

The Court: They are admitted, as are W, X and Y.

Mr. Sherman: Thank you, your Honor.

(The documents referred to were marked as Defendant's Exhibits D, E, W, X and Y, respectively, and received in evidence.)

The Court: Is this your writing up here? The Witness: No, it is not, your Honor.

- Q. (By Mr. Sherman): Now, Mrs. Cole, with reference to your dealings with the personnel or officers of the White-Ahlgren Company, is it not true that Hertha Clausen was appointed secretary-treasurer of the White-Ahlgren Company at your suggestion?
- A. I don't remember the exact conversation that took place. All I know is that I needed an application signed by a secretary and I asked them to appoint someone, I didn't care who it was.
- Q. Didn't you tell them, in substance, that they needed a secretary-treasurer and Hertha Clausen might as well be it?

 A. That is possible.
- Q. You now say that is possible that you might have said that?
 - A. I might have said that. I don't remember.
- Q. Mrs. Cole, do you remember testifying at a deposition here held in Los Angeles on June 16, 1959, at which your deposition was taken in this case? [105] A. Yes.
 - Q. Do you recall testifying as follows:
- "Q. Then I take it at no time did you suggest that she (meaning Mrs. Clausen) be made secretary-treasurer?
 - "A. Later on she was brought in and I told

them they needed a secretary-treasurer, but I didn't suggest Mrs. Clausen to be secretary-treasurer."

Do you now say that you might have suggested it?

- A. I don't remember it.
- Q. Can you definitely say now——

The Court: Counsel, let's get on. What is the difference?

Mr. Sherman: I am merely trying to establish the witness' testimony, your Honor.

The Court: The long and short of it is that she doesn't remember. She says she might have said it, she might not have said it, so if you have got some evidence that she did say it, let's get on with that.

Mr. Sherman: Very well.

- Q. Now, Mr. Hoover came in as the auditor for the White-Ahlgren Company at about the time that Mr. Oakes sent you the letter we have discussed, Plaintiff's Exhibit 10, is that correct? [106]
 - A. I don't remember the time.
- Q. Wasn't it around the end of March and the beginning of April?

 A. I don't recall.
- Q. Now whose idea was it, Mrs. Cole, that Mr. Hoover come in as auditor for the White-Ahlgren Company?
- A. Both Mr. White and Mr. Ahlgren needed an auditor and they asked me to recommend one, and I didn't want to recommend anyone, and I discussed it with Mr. Waite, and since we knew Mr. Hoover was a good man we mentioned his name, but we didn't recommend him one way or the other.

- Q. Did Mr. Waite suggest Mr. Hoover to the White-Ahlgren people?
 - A. He may have mentioned his name, yes.
 - Q. Mr. Waite at that time was the—
 - A. Manager of the bond department.
 - Q. —manager of the bond department?
 - A. Of Century Indemnity.
- Q. Didn't you indicate to either Mr. White or Mr. Ahlgren that Mr. Hoover was a man who had the approval and respect of the bonding company and he would be the man they should put on the job?

 A. I don't remember that.
- Q. Now Mr. Robert Easton came in as an employee of the White-Ahlgren Company at about the same time, didn't he? [107]
 - A. I don't remember.
 - Q. You don't remember Mr. Easton?
- A. Mr. Easton was there but I don't recall when he came in.
- Q. Was Mr. Easton the cost analyst on the job for the payroll? A. I don't know.
 - Q. Wasn't he brought in by Mr. Hoover?
 - A. I think so, but I don't know.
- Q. Did Mr. Hoover keep you advised as to the financial condition of White-Ahlgren after he became auditor?
- A. As I remember it, he called me and told me that there seemed to be a shortage on the job. That is as far as I can remember.
- Q. And he offered you no further financial advice as to what was going on, on the job?

- A. I don't remember of any.
- Q. Did he advise you that they had underbid the contract and would come out short?
- A. He explained to me that there had been a wrong set of plans used to bid the job.
 - Q. Did you tell anybody about that?
- A. I discussed it with Mr. Waite, I imagine. I don't remember what I did.
- Q. Didn't Mr. Hoover furnish you financial statements [108] that he made pertaining to White-Ahlgren Company after he became their auditor?
 - A. I don't remember that.

Mr. Sherman: May this be marked as Defendant's next in order.

The Clerk: Defendant's Exhibit Z.

(The document referred to was marked as Defendant's Exhibit Z for identification.)

- Q. (By Mr. Sherman): Mrs. Cole, I show you that which has been marked Defendant's Exhibit Z for identification. That purports to be a profit and loss statement for the period April 1, 1953, to March 31, 1954, of the White-Ahlgren Company, does it not? A. Apparently.
- Q. As best you can recollect, did Mr. Hoover furnish this statement to you?
 - A. I don't remember having seen it before.
- Q. You kept in day-to-day touch with Mr. White or Mr. Ahlgren, did you not, concerning the progress of the job?
 - A. That is difficult to answer yes or no for the

reason that if I received a call from creditors then I would call them, sometimes as many as five calls a day, and when I did, if I should receive a call, then I would relay the information to San Diego to the contractor's firm.

- Q. The creditors would call you? [109]
- A. They would be referred to me by White-Ahlgren. When they were buying material the material houses wanted to make sure that they would get their money and they would be referred to me that the money would be paid, and since I had no advance information from the contractor, then I would call the office and talk to whoever was there, usually Mrs. Higgins, and relay the telephone call I had received.
- Q. In other words, White-Ahlgren would tell these creditors that the decision as to whether or not they could pay for it or not was up to you?

A. They didn't say that. They said—

Mr. Burford: I object, your Honor.

The Court: The objection is sustained.

Q. (By Mr. Sherman): Mrs. Cole, didn't you discuss with Mr. White how much yardage the White-Ahlgren Company poured each day on the Camp Pendleton job?

The Court: When, Counsel? At the beginning, afterwards or when?

Mr. Sherman: On a day-to-day basis while Mrs. Cole was acting as trustee. My question is, didn't she on a day-to-day basis, every day or every other day, as a matter of practice speak to Mr. White

as to how much cement yardage they had poured on the Camp Pendleton job that day or the prior two days depending on the time? [110]

The Witness: At the end of a month and a half or so, Mr. White would tell me he had so much money coming in and I would ask him how many yards he poured so I could arrive at what the estimate of the money would be.

- Q. (By Mr. Sherman): Didn't you ever talk to him as many as five or six times a day concerning the progress of the job?
- A. When I would get calls from creditors I would. That wasn't very often, maybe once or twice a week.
 - Q. Didn't you talk to them almost every day?
 - A. Generally.
- Q. What would you talk to them about every day?
- A. Generally material that people would call me about.
 - Q. This happened every day?
 - A. Almost all the time.
 - Q. And as many as five and six times a day?
 - A. Only once or twice that happened.
- Q. Wouldn't you talk to them to find out how things were generally coming along?
- A. That is a matter of course. I do that all the time with all my clients.
- Q. And they would tell you how the job was progressing?
 - A. Yes, the routine matters with me.

Q. And that would include conversation as to how much cement yardage they poured? [111]

A. Yes. I do that with everybody.

Mr. Sherman: No further questions.

* * *

The Court: Do you have any redirect?

Mr. Burford: Would you like to have it now, your Honor, or would you rather have it after lunch?

The Court: Will it be extensive?

Mr. Burford: No, sir.

The Court: We have ten minutes left. Did counsel want to take the recess now?

Mr. Burford: Not me. I am ready to go.

The Court: Very well.

Mr. Burford: If your Honor please, I might state that a lot of the factual matter brought out on this cross-examination has, in effect, been stipulated to as to what the actual facts are.

Redirect Examination

By Mr. Burford:

Q. Now, Mrs. Cole, going back to these payroll records just a minute, I think there was some misunderstanding in the question and the testimony as to the records, but you did start issuing a check originally which was made out to [112] White-Ahlgren Company, Inc., for the gross amount of the payroll as given you by telephone or as furnished you on these recaps subsequently sent to

you, which are similar to the ones in evidence now?

A. Yes.

The Court: Including the withholding?

Mr. Burford: The original amount was the total amount.

The Court: Including withholding?

Mr. Burford: Including withholding.

The Witness: It was at the beginning, your Honor.

- Q. (By Mr. Burford): And that was deposited in the White-Ahlgren account?
 - A. Yes, as far as I know.
 - Q. Because it was written to White-Ahlgren?
 - A. Yes.
- Q. And we have the information as set forth showing the deposits and Exhibits D and E showing the drawing on the trust account and a deposit in the White-Ahlgren account, is that correct?
 - A. Yes.
- Q. So the total amount went into the White-Ahlgren general account? A. Yes.
- Q. That was an account which did not require the countersignature of any representative of Century Indemnity? [113] A. Yes.
- Q. So once that money was in that account they could use it for anything they saw fit?

Mr. Sherman: I will object to that as argumentative and speculative as far as this witness is concerned.

Mr. Burford: I will rephrase the question.

Q. Once that money was in the account it could

be drawn without the signature of a representative of Century Indemnity?

Mr. Sherman: That calls for a conclusion of this witness.

The Court: Overruled.

The Witness: Yes.

Q. (By Mr. Burford): Now, Mrs. Cole, you further testified that you found that these checks were not being written on the general account at the first here but were being written on the trust account for the individual employees?

A. Yes.

Q. Then when you found that out you wrote the letter to the bank and you discussed it, which is Defendant's Exhibit——

The Court: Well, it is the letter of January 15th.

Mr. Burford: That is the one, yes.

- Q. Now after you found that out, that was January 15th? A. Yes. [114]
- Q. Now the evidence is that for the payroll of January 18th, as I recall, you started writing net payroll checks?

 A. Yes.
 - Q. That is, it was one check? A. Yes.
- Q. Payable to White-Ahlgren but for the net amount of the payroll, that is, the gross payroll less taxes?

 A. Yes.
- Q. That amount, the money that you would otherwise have deducted from the employees' pay when the individual payroll checks were written, stayed in the Trust Account No. 1, is that correct?

- A. Yes.
- Q. Which would have been under the joint control? A. Yes.
- Q. Now, Mrs. Cole, you testified you started writing individual payroll checks on or about the end of March?

 A. Sometime in March.
- Q. Do you now recall why you started that practice?
- A. Because in the weekly payroll check that I would send them some of the employees that had been paid all of that money were unable to cash their check.

Mr. Sherman: Now, your Honor, I do feel this question and the answer that the witness is giving is purely hearsay, purely speculative as to what happened with these checks. [115] This witness has testified she had nothing to do with the handing of these checks to these employees. She knows nothing further than the fact that she made out a check to White-Ahlgren.

This is just trying to get in evidence through this witness that this witness does not properly possess.

The Court: Well, I think the form of the question is calling for a conclusion of the witness on direct examination as to why she did this. She changed the practice, or somebody changed the practice, or rather I should say the practice was changed.

The objection is sustained.

Q. (By Mr. Burford): Mrs. Cole, were you

directed by anyone to change your practice with respect to the writing of these payroll checks? I am talking now about the ones which you wrote as one check to cover the entire payroll.

- A. I changed it myself.
- Q. That was your decision?
- A. Because I had to pay the same employees twice.

Mr. Sherman: Your Honor, I will object and ask that the balance of the witness' answer be stricken.

The Court: Motion denied.

The Witness: I had to pay the salary to the same employee twice for the same week because the banks wouldn't honor their [116] checks, and they would call me.

Mr. Sherman: Again, your Honor, I move to strike the witness' answer as not responsive to the question, and as hearsay, speculative and a conclusion of the witness.

The Court: Well, it is all that, but I am going to overrule the objection nevertheless.

- Q. (By Mr. Burford): If a payroll check, Mrs. Cole, were not honored by the bank, did the bank notify you of its failure to pay the check?
- A. Some employees called me that their checks were not being cashed, and the bank called me that checks were presented without any money for these employees, and I was notified, if I remember correctly, by Mr. White that if these employees were

not paid immediately that the unions would fine them double the weekly salary.

Since I had to pay the same men twice for the same week I felt that I should pay them by individual checks myself.

- Q. And that is when you started the practice?
- A. That is when I started, yes.
- Q. The testimony on cross-examination was that this practice started on or about the same time as you received this telephone call from Mr. Oakes?
 - A. Somewhere around the same time.
- Q. Was there any connection insofar as you know between [117] this letter and this practice with respect to payroll checks?
 - A. None whatsoever.
- Q. Now, Mrs. Cole, just a few other questions here. I don't want to unduly burden the Court with this, a lot of these facts have been stipulated to, but we have gotten, I think, some confusion into the record.

With respect to the determination of the payment of checks now, you would receive, if I understand your testimony correctly, a phone call from a material house or supplier and they would say that we have an order here for some materials?

- A. Yes.
- Q. What did they say to you then?
- A. They would call up and find out whether I had money to pay them, that White-Ahlgren had informed them to contact me so they would be sure to get their money, and they would call me

to find out if they delivered material on the job site could I pay them.

I said that it was up to the contractor, there is money in the account.

- Q. Then what would you do?
- A. Then I would call White-Ahlgren and relay the information to them, that such and such a party had called me regarding a bill for material on the job.
 - Q. What was the purpose of the phone call?
- A. Purely to keep them informed that the people had [118] called me.
 - Q. Then what happened?
- A. They would either approve or, if it were not on the job, they would tell me it was not on this particular job, and if it was on this job they would send me a bill or tell me to pay it.
- Q. That is what I wanted to know. In other words, you would call them and ask them—
 - A. Oh, no.
 - Q. You wouldn't?
 - A. They would call me.
- Q. After the materialman would call you, you would then call Mr. White or Mr. Ahlgren?
 - A. Yes.
 - Q. Or some other representative?
 - A. Or Mrs. Higgins.
 - Q. And find out whether this was a proper bill?
- A. I would relay the information. It was up to them to decide what to do with it.
 - Q. Then they would tell you?

- A. They would tell me.
- Q. Then you would act accordingly?
- A. That is right.

Mr. Burford: Your Honor, at this time I have no further questions. [119]

The Court: Very well.

* * *

Recross-Examination

By Mr. Sherman:

- Q. Mrs. Cole, these materialmen, as I understand it, would call you because White-Ahlgren would tell them to call you to check, is that correct?
 - A. Yes.
- Q. Then you would tell the materialmen that the decision was not yours, but they should check with White-Ahlgren?
- A. I would tell them—they wanted to know if there was money in a joint control account to pay their bills—I would tell them there was money but it was up to White-Ahlgren to approve the bill.
- Q. And this went on, you said, all the time, that White-Ahlgren would tell them to call you and you would call White-Ahlgren? A. Yes.

The Court: Then you would call White-Ahlgren to tell them you got the call?

The Witness: That is right. [120]

Q. (By Mr. Sherman): Did you ever tell White-Ahlgren the decision is not mine, it is yours, don't refer these people to me?

- A. The reason for it, Mr. Sherman, is that apparently they couldn't get credit and therefore by referring the material men to me they wanted to assure the materialmen that there was money in the joint control account.
- Q. Now with regard to these checks that you would receive calls about, do you know why the individual employee or the banks at which these checks were attempted to be cashed would call you, the trustee, instead of the employer of these men?
- A. They had already called the employer, as far as I know, and then they would call me because the employer was unable to take care of it.

The Court: What he is trying to get at is how did they know to call you?

The Witness: Because White-Ahlgren would tell them.

- Q. (By Mr. Sherman): Do you know that?
- A. The bank would tell me.
- Q. Are you guessing or do you know that White-Ahlgren did? A. The bank knew.
- Q. The bank knew but you don't know how they knew? [121]
- A. I don't know how they knew, but they called me.
- Q. When you say you paid these men twice, as a matter of fact they would be paid once, the original check not having been honored and you having to write another check to cover the dishonored check?
 - A. I had paid the money to White-Ahlgren al-

ready, they used the money and then I had to pay the employee again.

- Q. Out of the trust account?
- A. Out of the trust account.
- Q. This was not taken into account at subsequent payrolls that were submitted?
 - A. That is right.
- Q. Weren't these adjustments made in subsequent payrolls? A. No, they were not.
 - Q. You are sure of that?
 - A. As far as I know, they weren't.
 - Q. But you had the payroll, didn't you?
- A. I know, but the fact remains that it was up to them to let me know what had to be paid.
 - Q. These adjustments could have been made?
- A. They could have been made, but as far as I know they weren't. [122]

* * *

DEMONT J. WAITE

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please.

The Witness: Demont, D-e-m-o-n-t, J. Waite, W-a-i-t-e.

The Clerk: What is your address, please; business.

The Witness: Now it is 3325 Wilshire Boulevard, Los Angeles 5.

Direct Examination

By Mr. Burford:

- Q. Mr. Waite, what is your present occupation?
- A. I am employed by the Glens Falls Insurance Company.
 - Q. In 1953 and '54 by whom were you employed?
 - A. The Century Indemnity Company.
 - Q. What was your position? [125]
 - A. I was manager of the bonding department.
- Q. In that position as manager of the bonding department, did you normally receive applications for bonds?

 A. Yes.
- Q. Do you recall receiving application for a bond from White-Ahlgren Company?
 - A. Yes.
- Q. I show you Plaintiff's Exhibit 2, which is an application for a bond. Is that the application you received?

 A. Yes.
- Q. When you receive an application for a bond at that time, Mr. Waite, when you received an application for bond what was your normal procedure?
- A. To investigate it, require information to be given to me that would permit us to write the bond applied for.
- Q. Did you follow that normal procedure in this application? A. Yes, sir.
- Q. What did you find when you pursued this procedure?

- A. Well, I don't just exactly know what you are asking for.
 - Q. Let me rephrase the question.

Upon receipt of the application did you issue the bond immediately?

A. No, sir. [126]

- Q. What did you do?
- A. Made further inquiries, required further information to be given to me.
 - Q. What sort of information?
- A. Oh, financial information, past experience, work on hand.
- Q. After receiving that information did you then issue the bond? A. No, sir.
 - Q. What did you do then?
- A. Made further inquiries that ultimately did result in issuing the bond. I don't follow your questioning.
- Q. Did you impose any requirements in connection with the issuance of this bond?
 - A. (Pause.)
 - Q. Strike the question.
 - A. I don't follow what you were getting at.
 - Q. Did you find that the application—

The Court: In the interest of saving time, I will permit you to lead the witness here to get to the point.

Mr. Burford: Thank you, your Honor.

- Q. Did you require any additional cash as a condition to issuing this bond?
 - A. Yes, sir. [127]

The Court: Why didn't you issue the bond in the first place?

The Witness: Because they didn't have enough money to operate the job.

- Q. (By Mr. Burford): How much cash did you require?
 - A. As I remember it, about \$35,000.
- Mr. Burford: May I have Defendant's Exhibit A, Mr. Stacey?

(The exhibit referred to was passed to Counsel.)

- Q. (By Mr. Burford): Mr. Waite, I show you Defendant's Exhibit A, a letter from you to Marine Development, Inc., dated November 16, 1953, in regard to the bond. Can you state the circumstances under which that letter was written?
- A. As I remember it, the Marine Development Company was under a time element here with the people in Texas who were to loan the money to operate this contract, and while I was not at that time satisfied with the information that had been given me to execute the contract or to authorize it to be executed, I told them, or I think they required or asked if I would write them a letter.
 - Q. Who is "they" now?
- A. The Marine Development Company—if I would write [128] them a letter to indicate upon what basis it would be that I would execute the bond and, as I remember it, this letter was then written.

The Court: That is Exhibit—

(Testimony of Demont J. Waite.)
The Witness: A.

(The exhibit referred to was passed to the Court.)

Q. (By Mr. Burford): Now, Mr. Waite, in that letter you stated on behalf of the company that you would commit yourself to write a bond upon receipt of \$25,000 cash by White-Ahlgren and advance payment of \$10,000 by Marine Development, which specific sum of money was to be deposited in a special bank account at White-Ahlgren Company, Inc., of which we as surety would have joint control.

Can you explain for the Court that requirement of joint control?

A. It had been indicated to me that a person or several people were going to loan money to the White-Ahlgren Company, and it was on that basis that I agreed to write the letter—no, let me go back.

When the money was to be loaned to the company, it was given to me.

- Q. By "they," who do you mean?
- A. By Mrs. Cole, that joint control would be exercised [129] over the money for the benefit of the people who were to put the money into the corporation, and knowing, of course, that that in itself would react to the benefit of the surety I incorporated it in the letter as part of my requirement.

But it was not an additional requirement of the company.

- Q. Do you know whether the \$35,000 referred to was actually put into the company?
 - A. No, sir; it was not.
 - Q. Do you know how much was?
- A. \$25,000—well, \$15,000 was put into the company and then Marine Development advanced the \$10,000 to get the record straight.
- Q. But \$25,000 was put into the joint control account? A. Yes.
 - Q. And the bond, of course, was issued?
 - A. That is right.
- Q. Now, Mr. Waite, I want to show you Plaintiff's Exhibit 10, which is a letter from Mr. Oakes, attorney for Marine Development Company in San Diego, dated March 23, 1954, addressed to Miss Eva L. Cole.

Did you ever see that letter? A. Yes, sir.

- Q. Under what circumstances did you see it?
- A. She handed it to me after having received it herself.
 - Q. After she did that, what did you do?
- A. I immediately got in touch with Mr. Van Tassel, who is our attorney, and turned it over to him.
- Q. Now, Mr. Waite, I show you Plaintiff's Exhibit 4-D, which is a signature card on the Security Trust and Savings Bank in San Diego, and this shows a signature purported to be yours as one of the trustees on that account. Is that correct?
 - A. Yes.
 - Q. This is dated June 11, 1954.

Did you ever have occasion, if you recall, to exercise your authority to countersign any checks on this account?

A. Yes, sir.

- Q. Would you state briefly under what circumstances?
- A. I went down on several occasions on a Friday afternoon to the job office at Camp Pendleton and countersigned the payroll checks.
- Q. Did you ever have occasion to sign any other checks other than payroll checks?
- A. I really don't recall. There may have been some small other ones.
- Q. Just what procedure, briefly, did you follow in [131] countersigning these checks?
- A. The checks were all prepared when I got there in the early afternoon and I would be presented with the checkbook and the list of names with amounts due on each and would compare them and countersign the checks.
- Q. Then what did you do with the checks after you countersigned them?
- A. Gave them to—either left the book there or gave them to the bookkeeper, or Mr. White or Mr. Ahlgren, either one of them who were there.

The Court: When was this?

The Witness: Every Friday afternoon that I went down, sir.

What are you getting at?

The Court: Several occasions on Friday. As I remember, we had a Mexican on the stand and we

asked him when last summer he did something, and he said about 4:00 o'clock.

Now you said several occasions on Friday. What Friday, beginning when?

The Witness: Very shortly after we received the Oakes' letter and on occasions when Mr. Van Tassel would not be able to go down on a Friday I continued to go down. I don't know how many times. It was until July or August.

The Court: You did not begin until after the receipt of the Oakes' letter? [132]

The Witness: No, sir.

The Court: At that time did Mrs. Cole then cease her activities in connection with signing?

The Witness: It wasn't immediately, but it was shortly after.

The Court: Signing checks?

The Witness: Yes, sir.

Mr. Burford: This signature card, 4-D, your Honor, is dated June 11th of 1954, on which Mr. Waite appears as one of the trustees.

The Court: It was prior to that letter, wasn't it? What is the date of the Oakes' letter?

Mr. Burford: The Oakes' letter is March 23rd. The Court: Were these occasions prior to June that you went down there?

The Witness: I can't remember, sir. I would guess not now that he has brought out the date.

The Court: The signature card was June—the previous one——

Mr. Burford: There is a statement attached to

Exhibit B which I referred to right here (indicating to the Court).

The Court: For signature of D. J. Waite, attorney in fact, authority to sign for Century Indemnity Company, see resolution dated 12-2-53 and resolution filed 1-12-54.

Mr. Burford: His signature doesn't appear on the card [133] but we will assume from this that he was an authorized signator and for the purposes of the present case we will so stipulate.

Mr. Sherman: May I say for the record that all assumptions of Counsel are his own?

The Court: You mean you don't want to stipulate?

Mr. Sherman: I don't know, your Honor, that Mr. Waite was an authorized signatory if his name doesn't appear on the card.

The Court: I thought that is what you were trying to prove.

Mr. Sherman: Pardon me.

The Court: I thought that was what you were trying to prove, or one of the things you were trying to prove.

Mr. Sherman: Not with reference to Mr. Waite alone. I think we can prove adequately that each and every one of the representatives who signed as trustees were connected with Century Indemnity Company. That doesn't mean Mr. Waite was authorized to sign right away rather than later. That may be true, I don't know, for purposes of stipulation and representing it to this Court as a fact.

Mr. Burford: I will certainly withdraw that. I was just trying to short cut.

The Court: Let me see the exhibits again.

(The exhibits referred to were passed to the Court.) [134]

The Court: Have you got the original cards here? Mr. Sherman, have you got the original cards?

Mr. Sherman: The original cards are in the possession of the bank. At the time we took a deposition of Mr. Frazier, the vice-president of the bank, this deposition is here and his testimony discloses that the copies we have been using are true photostatic copies of the bank's originals.

I believe the exact form in which the signature card shows, your Honor, is the signature card on its face and then stapled to the front of it is what appears to be this insertion on the side which merely is typed and stapled to the front of the signature card. I think that is the way the original actually looks.

The Court: There is another exhibit here which was directed to the bank concerning account number so and so.

Mr. Sherman: Those were instructions to the bank, your Honor. I believe it is Defendant's Exhibit B.

(The exhibit referred to was passed to the Court.)

The Court: Instructions to the bank.

Mr. Sherman: In which Mr. Waite's name does appear as a party who should be authorized to sign but, apparently, the signature card does not contain his signature. It merely says for Mr. Waite to [135] sign.

So I guess those are the facts and we can draw whatever conclusions we wish from them.

The Court: This is dated December 2, 1953.

Mr. Sherman: Yes, your Honor.

The Court: I think I will take it as a fact from that, that Mr. Waite was authorized to sign after December 2, 1953.

Mr. Burford: Yes, your Honor.

Mr. Sherman: Very well.

The Court: Proceed.

- Q. (By Mr. Burford): Mr. Waite, I believe you testified that pursuant to this authority to sign you did sign payroll checks on occasion and some other checks? A. Yes, sir.
- Q. Now, Mr. Waite, where did you sign these checks?
 - A. In the job office at Camp Pendleton.
- Q. While you were in the job office at Camp Pendleton, did you have any contact other than just seeing the men working on this job?
 - A. No, sir; none whatever.
- Q. Did you ever have any authority to hire or fire or set terms of employment? A. No, sir.
- Q. Did you ever attempt to exercise any such authority? [136] A. No, sir.

Mr. Burford: If the Court please, that is all of our direct examination.

The Court: Cross-examine.

Cross-Examination

By Mr. Sherman:

- Q. Mr. Waite, to make sure that I understand you clearly, when they originally applied to you for a bond, you felt they were underfinanced and would not write the bond unless the extra cash was put up?

 A. That is right.
- Q. The original requirement with regard to extra cash was for them to put up \$25,000 and Marine Development to advance \$10,000?
 - A. May I answer that other than yes or no?
- Q. Let me put it this way: Is that what you indicated in this letter? A. Yes.
- Q. Now, as a matter of fact, however, you did eventually authorize the issuance of the bond when only a total of \$25,000 was put up?
 - A. That is right.
- Q. Only \$15,000 cash to the company and Marine Development's \$10,000? [137]

A. Yes, sir.

The Court: And you began to sign the checks after the \$25,000 had long previously been spent? The Witness: I presume so.

The Court: So it was your intention here that the trustee account would not be limited primarily to the expenditure of the \$35,000?

The Witness: Oh, no.

The Court: And it was your intention that all money expended by them on that job should go in a joint trust account?

The Witness: Yes, sir.

The Court: A joint account?

The Witness: Yes, sir.

Q. (By Mr. Sherman): Well, then, knowing that they were underfinanced and knowing that they had not even met your original requirements of deposit, didn't you, as the bonding manager for your company insist, as indicated in this letter, that the funds to be expended on the job be subject to the control in part of your company?

A. No, sir. May I answer in my own words now to give you the story?

The Court: You can explain your answer if you desire.

The Witness: My original action was to turn the bond [138] down, and when Mrs. Cole as agent came to me with other plans and financing thoughts that were to be included then I went ahead and said, well, yes, maybe we can work it out on that basis.

- Q. (By Mr. Sherman): Regardless of whose idea originally it was—whether Mrs. Cole's or yours—you did adopt this suggestion that you acquire a joint control before you would issue the bond. Is that correct?

 A. Yes, sir.
- Q. As a matter of fact, is it not correct that you made known to the parties concerned that Century

would require a joint control account before the bond was written?

A. Yes, sir.

- Q. And that is what was told to the Marine Development people. Is that correct?
 - A. I presume so.
- Q. Did you ever have any communication with the Marine Development Company people other than this letter? A. Well, that letter.
 - Q. Concerning what you would require?
- A. I may have, but I don't remember. I have met them. What was said at the time I do not remember.
- Q. What would it be at variance with anything you said in this letter? [139]
 - A. I am sure it would not be at variance, no, sir.
- Q. When you acted as trustee over the joint control account were you countersigning checks on behalf of Century Indemnity, or somebody else?
 - A. Century Indemnity Company.
- Q. Now, at the time when you would appear and countersign these checks at the jobsite, did anyone in White-Ahlgren Company furnish you with payroll recaps showing the amounts due the individual employees? A. Yes, sir.
- Q. And to the best of your recollection was this done on each occasion you went down there?
 - A. Yes, sir.
- Q. Now you learned, did you not, that Mr. Rex Hoover had come to work as auditor for White-Ahlgren after the Oakes' letter of March 23rd?
 - A. Yes.

Q. Prior to that time had you ever met Mr. Hoover? A. No, sir.

Mr. Sherman: No further questions. [140]

* * *

ALBERT C. WHITE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: Albert C. White, W-h-i-t-e.

The Clerk: Your address, please.

The Witness: 5349 Rhea Avenue, Tarzana, California.

Direct Examination

By Mr. Burford:

- Q. Mr. White, you are the White of White-Ahlgren, I take it?

 A. That is right, sir.
 - Q. What is your present occupation, Mr. White?
- A. I am a salesman for a building material manufacturing concern.
- Q. Prior to that you were connected with White-Ahlgren? A. That is right, sir.
 - Q. Between approximately what dates?
- A. I would say my first connection going down to San Diego and becoming connected with them started about October of 1953, I believe.
- Q. Just before the commencement of the work on this contract?

 A. That is right.

- Q. And you were with them during this period?
- A. That is right.
- Q. What was your connection with the company during this contract?
- A. I was appointed the vice-president. That is what my business card said.
- Q. What were your actual duties briefly? [143] The Court: Were you an owner of the company? The Witness: No, sir. I didn't own any part of it.

The Court: Were you a salaried employee?

The Witness: A salaried man, yes, sir.

The Court: Who owned it?

The Witness: Well, there were some stockholders whom I am not acquainted with that were supposed to be the owners of the company.

The Court: Who ran it?

The Witness: Well, there was Mr. Walter Ahlgren, was the president of it, and his brother was one of the stockholders, although I don't believe he had any say in actually running the company. As far as running the company or directing the company, Mr. Ahlgren was the man responsible for it.

The Court: In other words, you took your orders from Mr. Ahlgren?

The Witness: That is right.

- Q. (By Mr. Burford): Who were you with before that, Mr. White?
- A. I was with Consolidated Rock Products Company here in Los Angeles.

- Q. Perhaps it would be helpful if you would just review very briefly what this work consisted of, this contract.
- A. It consisted of placing the concrete for [144] the foundations, the footings or foundations, for this housing tract that Camp Pendleton was having built. It was still a concrete contract. We had nothing to do with any other part of the job other than placing the concrete.
- Q. In connection with that work, what sort of materials did you acquire?
- A. We used the materials to make concrete, rock, sand, cement. We used reinforcing steel wire, mesh for reinforcing, lumber for forming, nails—that is about the extent of it.
- Q. About how many men did you have employed at any one time?
- A. I can't really say. I don't remember how many men were on the payroll at that time.
- Q. Mr. White, you countersigned with the trustee for Century Indemnity Company a number of checks. Were you familiar with how those payroll checks were handled?

 A. I believe so.
- Q. Beginning at the first of the contract, will you describe briefly how they were handled at that time?
 - A. At the beginning of the contract?
 - Q. Yes.
- A. We were under joint control with Century Indemnity, with which we had a trustee. At that time, at the beginning of the job, it was Mrs. Cole.

One of the members of White-Ahlgren who were authorized to sign the check was supposed to [145] sign, and a check was to be countersigned by Mrs. Cole or someone with Century before the check was to be issued.

- Q. Were you one of those so authorized?
- A. I was; yes, sir.
- Q. Now on the original payrolls, where did you get the money for meeting the individual payrolls, the individual employees' payroll that you recall?
 - A. Will you state that again, sir?
- Q. When you started out were individual payroll checks issued that were countersigned by the trustee?
- A. Well, the first checks that were written, no, they weren't.
 - Q. How did that work?
- A. That come about through a misunderstanding between——
- Q. First explain what happened. Tell the Court what happened before you explain why.
- A. I think three, and possibly four, weeks of payroll checks for the employees on that job were written on the Trust Account No. 1 checks and issued by our office signed by myself and Mr. Ahlgren. Is that what you mean?
- Q. Yes. In other words, a check for the payroll was written and countersigned by the trustee, deposited in the White-Ahlgren Company, Inc., general account, and then individual payroll checks were written, signed by you and Mr. Ahlgren, which

were drawn on Trust Account No. 1 rather [146] than the general account, is that a correct statement?

A. That is right.

- Q. Now you were going to explain.
- A. I was going to explain it being a mistake, starting off with the trustee account. I don't believe anyone in our office at that time, and I am definitely sure I did not understand it, the mechanics of how the trustee account was to work.

Now the checkbook was left in our office, and I am sure Mrs. Higgins, our office girl, understood that she was to make out our payroll checks on that particular checkbook which she did, and Mr. Ahlgren and I both signed the checks. They were issued and honored at the bank.

As I say, it was a mistake through purely our office not knowing that the Trust Account No. 1 check was to be written and signed by Mrs. Cole and sent to us and we were to deposit it in our own bank account and write checks.

It was corrected shortly after, I believe the third or fourth week—I am not sure how many weeks we continued that policy until it was corrected.

- Q. Now subsequently, as I understand it, individual payroll checks were written to the individual employees on this Account No. 1, Trust Account No. 1?
- A. We are still talking about the first three or four weeks?
 - Q. No, later, when individual checks were writ-

ten and [147] countersigned by the trustee payable to the individual employee.

- A. It was still on the Trust Account No. 1 checks, I am sure.
- Q. How was that handled? First of all, where were the checks signed?
 - A. At our job office there at Camp Pendleton.
- Q. Were you there upon occasion when they were signed?
 - A. Most of the time I was, yes.
 - Q. What was the procedure followed?
- A. The procedure was, our girl in the office, Mrs. Higgins, would make a payroll recap taken from the time cards that the various foremen would submit of the men they had on the job.

She would compute the time, make a payroll recap, and it was presented to the representative of the trust account, or Century Indemnity, to whoever it might be that came down to be the countersigner.

- Q. Did you or any other authorized representative of the company sign the checks also?
 - A. Did I as a representative?
 - Q. Or another representative.
- A. Oh, yes. On many occasions I have signed for the company.
 - Q. Did you check the payroll before you signed them?
 - A. Yes. It was a procedure that we followed, to check [148] the various names on the recap.
 - Q. Well, now, Mr. White, I want to show you

Plaintiff's Exhibit 10, which is the letter from Mr. Oakes to Mrs. Cole of March 23, 1954.

- A. (Examining exhibit.) Yes, sir.
- Q. Were you aware that such a letter had been written? A. Yes, sir.
- Q. Now following this letter of March 23rd, did you ever have occasion to meet with representatives of Marine Development, Inc., in connection with the status of the transaction?
 - A. Prior to this development?
- Q. No, after this letter, at any time—let me put it this way:

Did you have any conferences with representatives of the Marine Development Company in connection with your performance under this contract?

- A. Yes; we have.
- Q. Do you know about when you had such first meeting?
- A. No, I don't remember the date of any meeting. As a matter of fact, our office and their office was about a hundred yards apart on the job site and occasionally we actually met with them right out on the job and discussed the job from day to day.
- Q. Did you ever discuss the substance of this letter? [149] For example, this letter is signed by you as vice-president of White-Ahlgren.
- A. I don't remember having any discussion with them prior to that letter about the substance of the letter, no, sir.
 - Q. Well, subsequent to this letter, Mr. White,

this letter refers to a default consisting mainly in the fact that White-Ahlgren Company, Inc., was approximately 75 units behind the construction rate called for in the subcontract.

Now after this letter, which you signed, did you ever have any conference with any representative of Marine Development about your performance under the contract?

- A. I was present at a meeting in the Marine Development office when Mr. Van Tassel came down, when we discussed the substance of this letter in connection with Marine Development's complaint that perhaps we weren't getting out as much work as they thought we should.
- Q. Do you recall who was present at that conference, or some of the men there?
- A. I was present, Mr. Van Tassel was present, Mr. Summers and Mr. Jackson of Marine Development. I don't remember whether anyone else was present or not, sir.
- Q. What was the result of that conference, Mr. White, what action was taken as a result of that conference?
- A. I believe the outcome of it was—I wasn't present at the latter conference between Mr. Van Tassel and Mr. Oakes— [150] but the result of it was we were allowed to proceed in the construction at a slower rate, and I believe we at that time were on a monthly progress draw as far as monies were concerned, and I believe that it was agreed that we

(Testimony of Albert C. White.) could have a weekly progress draw if it would benefit us in any way.

- Q. Now, Mr. White, you were connected with this contract and performance all during this period until the contract was completed, were you not?
 - A. That is right, sir.
- Q. Other than for the acceleration of progress payments from a monthly to weekly basis and a rescheduling of your performance requirements, what other changes were made in the contract, if you know, in your method of performance?
- A. I don't believe there was any other change made in the contract. If you mean that we changed our procedure entirely.
- Q. Did you do anything other than that? How did you perform, what did you do; did you continue just as you had, or did you change it, or what?
- A. No; there wasn't any change. We continued the job under the present procedure.
 - Q. Who is "we"?
 - A. The White-Ahlgren Company.
- Q. Now after this conference, Mr. White, did you have occasion to have contact with Mr. Van Tassel representing The [151] Century Indemnity Company in connection with contract matters?
- A. Yes, I did. Mr. Van Tassel used to come down on Friday afternoons and countersign the checks and used to come down and go with us into the Marine Development office to draw our progressive check or progressive pay.

- Q. And he countersigned checks?
- A. Payroll checks, yes.
- Q. That would be what sort of checks?
- A. Our regular payroll checks and what materials bills that we would have available.
- Q. In connection with the payment of material bills, explain how they were paid, if you will, for the benefit of the Court.
 - A. Well, we would take the—
 - Q. Who is "we" now?
- A. Mr. Van Tassel, myself and Mr. Ahlgren, or whoever happened to be present in the office, would take the total amount of the materials bills that were due and go over them. I don't believe we ever had the money to pay them all at one time, but we would take the most pressing ones and pay those, and I believe at times we tried to disburse a little money to one or more of the suppliers that seemed to need their money real bad, give them what we could, but we would discuss which were the more pressing bills to be paid and pay those first. [152]
- Q. How did you arrive at the decision as to which were the most pressing bills?
- A. Well, I am not really sure, it has been quite a little while ago, but I just imagine the same procedure holds true today, the one that is on your back the most is the one you pay.

The Court: The what?

The Witness: The one that is giving you the more preference than any of the rest of them.

- Q. (By Mr. Burford): Who determined which one that was?
- A. Well, that is a question, too, that is hard to answer. I think we would discuss it among ourselves and more or less all of us generally agree which bill was the most pressing.
- Q. Now, Mr. White, do you have any recollection of any discussion down at the job site in connection with the payment of any Federal payroll taxes?
- A. Yes, I remember talking to Mr. Van Tassel about it. I don't remember the date, no, sir.
- Q. Do you remember what sort of taxes you were talking about?
- A. I don't know whether it was the third or the fourth quarter taxes, but it was one of the quarter taxes that was due.
- Q. What was the substance of that [153] discussion?
- A. Well, in my discussion with Mr. Van Tassel about that at that time, if my memory serves me right, the fact that we didn't have the money to pay it, there wasn't sufficient funds in our account to pay it.
 - Q. That was the substance of the discussion?
 - A. Yes.
- Q. Now, Mr. White, who had the authority to hire and fire the men working on this subcontract?
- A. There was a number of us, Mr. Ahlgren, John Ray, his brother, Bill, myself, Mr. Ahlgren's brother, George Ahlgren.
 - Q. Were they all employees of the White-Ahl-

(Testimony of Albert C. White.)
gren Company?

A. That is right.

- Q. Did anyone else have any such authority other than employees of White-Ahlgren?
 - A. Actually not any authority, no, sir.
- Q. Do you know of any instances in which a representative of The Century Indemnity Company exercised such authority?
 - A. Not directly, no, sir.
 - Q. What do you mean by that?
- A. In the last part of the job, I would say the last month or six weeks of it, Marine Development——
 - Q. I am referring now only to Century.

Mr. Sherman: I believe the witness should have an opportunity to explain.

The Witness: Well, let me say this: I don't believe [154] that they ever actually fired anybody directly, no, sir.

- Q. (By Mr. Burford): Who is "they" now?
- A. I am talking about Century Indemnity.
- Q. Go ahead with your explanation. I thought maybe you misunderstood my question.
- A. I was going to explain a situation that happened down there in the latter part of the job which, as I say, the superintendent that we had running the job, Marine Development, decided that they didn't like his procedure, they didn't like the way he was running the job, and they called myself and Mr. Van Tassel in for a conference on it, and, of course—I may be getting this story ahead of what you have in mind.

- Q. No; that is all right.
- A. It was along about the time that they kept wanting to call us to fault, and Mr. Summers then gave us more or less an ultimatum.
 - Q. Who is Mr. Summers?
- A. Mr. Summers is one of the owners of Marine Development, Inc.

They wanted to put a man in by the name of Jones into Mr. Ray's spot as the superintendent, and make him accountable only to Marine Development general project manager, Mr. Frank Jackson which, as I say, they more or less held the club over our heads of a default and left us no [155] other alternative than to make that decision, for which Mr. Van Tassel and myself had to go outside where Mr. Ray and Mr. Ahlgren were waiting for us, and Mr. Van Tassel explained the situation to them of what we would have to do.

That is what I mean when I say "indirectly."

The Court: In other words, he relayed——

The Witness: What Mr. Summers gave us as an ultimatum.

The Court: ——what Mr. Summers told you?

The Witness: Yes, sir.

- Q. (By Mr. Burford): That was actually the requirement of Marine Development, Inc.?
 - A. They did require us to do that.
 - Q. And that was done? A. Yes, sir.
- Q. Do you know whether Marine Development ever declared a default under this contract?
 - A. Not to my knowledge, they never declared us.

We were never served with a default. I am not sure that you have to be served with some kind of a default paper, some legal paper.

Q. You did complete the contract after complying with Marine Development's requirements to which you have just testified, is that correct?

A. Yes, sir. [156]

Mr. Burford: No further questions.

Cross-Examination

By Mr. Sherman:

Q. Mr. White, I show you Defendant's Exhibit A in evidence, a letter by D. J. Waite addressed to Marine Development, Inc., under date of November 16, 1953.

Have you ever seen that letter before?

- A. Yes, sir; I have.
- Q. Where did you first see it?
- A. I believe Mrs. Cole gave me that letter in her office.
 - Q. Was this before the bond was written?
 - A. Yes, sir.
- Q. Was this at a time when you were attempting to determine under what conditions the bond would be written?

 A. That is right.
- Q. Did you discuss the contents of the letter with Mrs. Cole at that time?
- A. Yes; I am sure we did. Actually this letter was grounds, if we met the conditions here was

whether or not we [157] got the bond. I am sure I did discuss it with Mrs. Cole.

- Q. The discussion with her were were the conditions set forth in the letter?

 A. Yes, sir.
- Q. In your discussions with Mrs. Cole did she indicate to you that Century Indemnity would require a joint control account?
- A. I believe Mrs. Cole's statement to me, if I remember correctly, is that by having joint control we would probably have a better chance of getting Mr. Waite to okay the bond, or we would have a better chance of getting a bond if we had joint control.
 - Q. That was the first discussion?
 - A. In our first discussion, yes.
- Q. It was after that first discussion that you saw this letter, is that correct, after you found out what the bonding company had in mind, is that correct?
 - A. Yes. This letter came after our discussion.
- Q. At that time you discussed with Mrs. Cole, did you not, what the bonding company would require as indicated in the letter?
 - A. As indicated by the letter, yes, sir.
- Q. And was it your understanding at that time from your conversation with Mrs. Cole that as per the letter the bonding company would require the joint control account? [158]

Mr. Burford: If the Court please, I assume that this is supposed to be cross-examination, none of this being covered on direct.

The Court: I suppose. I don't know what difference it makes with this witness.

Mr. Sherman: Your Honor, I think we have the witness here and it is proper cross-examination.

The Court: Is there any doubt but what The Century Indemnity Company wanted joint control of this account?

Mr. Sherman: Mrs. Cole testified she has never seen that letter.

The Court: I mean on the part of the plaintiff here. Is there any question but what Century Indemnity wanted to and did have joint control of this account?

Mr. Burford: We have stipulated that there was joint control.

The Court: Then why cross-examine him on it? Mr. Sherman: Very well, your Honor.

- Q. Was it your understanding at that time, Mr. White, that all money from the Marine Development job at Camp Pendleton was to go into the trust account? A. That is right.
- Q. Was it also your understanding that the money Mrs. Clausen was putting up would also go into the trust account?
 - A. That is right. [159]
- Q. At the time that the bond was written, Mr. White, under the name of Wright-Ahlgren your company was performing a job for Webb & Knapp?
- A. I don't think the bond was written under the name of Wright.

The Court: It says your company was performing—

Mr. Sherman: Performing a job under Wright.

The Court: That assumes a fact not in evidence.

Mr. Sherman: I am asking the witness whether or not at the time the bond was written your company——

The Court: That is it, what company?

Mr. Sherman: The White-Ahlgren Company.

The Court: Yes?

Mr. Sherman: Under the name of Wright-Ahlgren was performing a job for Webb & Knapp at Claremont Gardens.

The Witness: That is right.

Q. (By Mr. Sherman): Now with the exception of a payment on December 15, 1953, from the Webb & Knapp people, to your knowledge did White-Ahlgren get paid any monies from the Webb & Knapp job after the Camp Pendleton job [160] started?

* * *

The Court: He wants to know whether or not after December 15th the White-Ahlgren Company received any money from the [162] Webb & Knapp contract at Claremont Gardens?

The Witness: We didn't. The company didn't receive any money, no. There was money due, if that is what you mean.

Q. (By Mr. Sherman): But you didn't receive any?

A. We didn't receive any, no, sir.

- Q. Were there any other jobs being performed by your company at the time the Camp Pendleton job was being performed from which you could have received money? A. No, sir.
- Q. So then the Camp Pendleton job was the only job from which you were actually receiving money?
 - A. That is right, sir.
- Q. And all of those monies, I believe you testified, were required to go into the joint control?
 - A. Into the joint control account.
- Q. Was it also a requirement that all disbursements from the trust account required a counter-signature of Century Indemnity?
 - A. Yes, sir.
- Q. Mr. White, I now show you Defendant's Exhibit V for identification, which purport to be checks on the White-Ahlgren Trust Account in blank except for your signature. Have you seen those before?

 A. Yes, sir. [163]
 - Q. Is that your signature on those blanks?
 - A. Yes; it is.
- Q. What did you do with them after you so signed them?
- A. I signed these in Mrs. Cole's office and the object of this was when bills occurred on the job and were sent to her for payment, she could use these checks to pay these bills, and with my already signing them I wouldn't have to drive up from San Diego and she wouldn't have to come back down to San Diego to sign these checks.

The Court: Do you know whether she did do that on any occasion?

The Witness: I am sure she did.

Q. (By Mr. Sherman): Did you give those to her?

A. Yes; I did.

Mr. Sherman: I offer them into evidence as Defendant's Exhibit V, your Honor.

The Court: Admitted.

(The documents referred to were marked as Defendant's Exhibit V and received in evidence.)

- Q. (By Mr. Sherman): Now going to the time when The Century representative would come down to the job site every Friday to countersign the payroll checks, do you recall whether or not [164] payroll recaps were furnished to Mrs. Cole during those occasions when she appeared at the job site?
 - A. Yes, she would have the payroll recaps.
- Q. And she also was furnished payroll recaps before that procedure was instituted?
- A. Yes, before they started coming down to our job office to sign them. Our office mailed payroll recaps to Mrs. Cole's office.
- Q. And you would also furnish Mr. Van Tassel with such payroll recaps when he would come down on the job?

 A. That is right.
- Q. That was the manner in which they were able to check as to what was due and the amount of the check he had written to the employees, is that correct?

 A. That is correct.
 - Q. Now you testified with reference to a discus-

sion you had with Mr. Van Tassel concerning payment of payroll taxes.

Was that, as best you recall, at a time when Mrs. Higgins presented to Mr. Van Tassel a check for his countersignature on the payment of such taxes?

- A. I believe it was, yes.
- Q. And at the same time did she submit a quarterly return to Mr. Van Tassel for his approval?
- A. Now whether she submitted a quarterly return made up or not, I don't know. [165]
- Q. I believe you further testified that at that time there wasn't enough money in the trust account to pay the taxes, is that correct?
 - A. That is right.
- Q. Had you up to that time been paying suppliers? A. Yes; as far as we could.
 - Q. And you had been paying payroll?
 - A. That is right.
 - Q. And other items? A. That is right.
- Q. And the shortage in the account was because of these items which you paid?

The Court: That calls for a conclusion of the witness.

Mr. Sherman: Very well.

The Court: The shortage in the account was because there wasn't enough money in the account?

Mr. Sherman: I am trying to determine why there wasn't enough money, your Honor.

Q. Now you also testified concerning conversations you had had with Mr. Van Tassel and Mrs. Cole concerning which suppliers to pay. In whose

lap, if I may use that term, if you understand it, did the ultimate decision lie as to whether or not a particular supplier would be paid, yourself or the representative of Century Indemnity Company?

Mr. Burford: Isn't that also a conclusion, your Honor? [166]

Mr. Sherman: I think, your Honor, this goes to the question of how was the procedure carried out.

The Court: The objection will be sustained.

Q. (By Mr. Sherman): Now with respect to these checks that you testified about, which were written without the countersignature, your book-keeper, Irene Higgins, did have checkbooks of the trust account, blank checkbooks of the trust account, did she not?

The Court: You are referring now to this series of checks signed when the job was first commenced?

Mr. Sherman: I am referring to that period, your Honor.

The Court: Yes.

- Q. (By Mr. Sherman): She did have blank checkbooks? A. Yes.
 - Q. Checks on the trust account?
 - A. She had the trust account checkbook there.
 - Q. Were they given to her by Mrs. Cole?
- A. I am going on the assumption that she did, she had them, and I am sure Mrs. Cole would probably have to give them to her.
 - Q. Did you give them to her? A. No.

The Court: Do you know whether she got them from Mrs. Cole or the bank? [167]

The Witness: I am sure she had picked them up from Mrs. Cole. Mrs. Cole had left the checkbook there.

Q. (By Mr. Sherman): What were the circumstances under which you first discussed the writing of these checks with Mrs. Cole, did she call you or did you call her?

A. No; I am sure that I called Mrs. Cole.

The Court: "These check"?

Mr. Sherman: Yes, your Honor.

The Court: What are "these checks"?

Mr. Sherman: You are correct, your Honor. The checks, Plaintiff's Exhibit 36, I believe, which did not contain any countersignature.

Q. You were saying?

A. I am sure I called Mrs. Cole's attention to the fact after I had noticed what we were doing, in going back over and discussing it, if my memory of the mechanics of the Trust Account No. 1 is correct, and why the checks were made that way, the more I thought about it the more I knew we were wrong, there was a mistake made, the payroll was not supposed to be made on that particular checkbook.

I called Mrs. Cole on the phone from our office in San Diego and called her attention to it, that I personally thought a mistake had been made, that the checks weren't supposed to be made on that particular check. [168]

- Q. Did she at that time indicate to you that she knew about it?
- A. No; I believe that was Mrs. Cole's first knowledge that it was being done that way.
- Q. Now with reference to the officers and employees of White-Ahlgren, and who they were to be, did Mrs. Cole select Mrs. Clausen as secretary-treasurer of the White-Ahlgren Company?

The Court: That calls for a conclusion of the witness, Counsel.

Mr. Sherman: I will rephrase it then, your Honor.

- Q. Were you present at any time when Mrs. Cole stated in your presence to Mrs. Clausen, in words or substance as follows: You people need a secretary-treasurer and Mrs. Clausen might as well be it?
- A. Yes, I was present. I can't swear under oath that that was the exact words, but we did someone to sign as secretary and treasurer at that time, and she turned to Mrs. Clausen then and said, "Will you sign as secretary and treasurer?"
- Q. Did you ever have a discussion with Mr. Waite concerning the hiring or Mrs. Hoover as the auditor for White-Ahlgren?
- A. Not to my knowledge. I don't remember talking to Mr. Waite about Mr. Hoover. [169]
 - Q. Did you ever discuss it with Mrs. Cole?
 - A. No.
- Q. Did she suggest that White-Ahlgren hire Mr. Hoover?

A. Mrs. Cole discussed Mr. Hoover with me one time. She started by saying we needed a good auditor, which was true, we did one, and she recommended Mr. Hoover.

Now, how Mr. Hoover got hired by our organization, I can't truthfully answer you that question because I didn't hire him.

Q. Did Mr. Hoover come upon the scene after the Marine Development people had brought you in for discussion pertaining to the rate of progress you were making on the job?

Mr. Burford: If the Court please, I don't particularly object to this but——

The Court: That is far afield from the direct examination. Objection sustained.

Mr. Sherman: May I, for the purpose of that question and some others, adopt this witness as my own, your Honor?

The Court: Better make up your mind. Let us not flop around. If you are through with cross-examination and want to call him on direct, you can now call him as your direct witness.

Mr. Sherman: I will continue with the cross-examination and then pick up with such other questions as the Court feels I have no right to ask him now on cross. [170]

The Court: Very well.

Q. (By Mr. Sherman): Now you testified, Mr. White, concerning the manner under which John Ray left the employ of the White-Ahlgren Company, and I believe you stated that the Marine De-

velopment people called Mr. Van Tassel as well as yourself into their office to discuss this matter.

- A. Yes. I am not sure exactly how we were called in. I know it was pertaining to, I presume this letter of Mr. Oakes, or something similar to it, concerning the work. I don't remember whether they called Mr. Van Tassel and myself for a meeting specifically for that, or if we were in on some other discussion, but this came up. I am sure Mr. Van Tassel was asked to be in the meeting the same as I was.
- Q. In discussing the matter with you, did they all talk directly to Mr. Van Tassel or was all the conversation directed to you?

Mr. Burford: I will object to that, your Honor.

Mr. Sherman: This is cross-examination of a matter brought up on direct, your Honor.

The Court: It calls for his conclusion whether the conversation was directed to him.

The Witness: I would answer this, I think it was directed to both of us from time to time. [171]

- Q. (By Mr. Sherman): Well, after you left that meeting, Mr. White, did you then see Mr. Ray?
- A. Yes, we did. Mr. Ray and Mr. Ahlgren were waiting for us outside, and after this particular ultimation, shall we say, was given to us by the Marine Development officials, I believe we asked them—I think Mr. Van Tassel asked them—for a short recess so we could go out and discuss it with Mr. Ray and Mr. Ahlgren.

When we went out Mr. Van Tassel discussed their

they would go along with.

(Testimony of Albert C. White.) ultimatum with them and under what conditions

Q. Who was it who told Mr. Ray that he would have to leave?

A. Well, I think Mr. Van Tassel explained it to both Mr. Ray and Mr. Ahlgren.

- Q. Well, Mr. Ray at that time was working for White-Ahlgren, was he not? A. Yes, he was.
- Q. And after he was advised of how Marine Development felt about his continuance of services, who was it who told him that under the circumstances, or whatever the conversation may be, but who was it that eventually told him, you will have to leave?
- A. Well, I will answer it this way: I think Mr. Van Tassel because that was the understanding of the conditions that [172] Marine Development gave us, that we would have to go along with.
 - Q. Did you tell him he would have to leave?
- A. I don't recall telling him personally he would have to leave, no, sir.
 - Q. Did Mr. Ahlgren tell him?
- A. I am not sure that I heard a discussion between Mr. Ahlgren and Mr. Ray.

The Court: When did he leave, right at that instant?

The Witness: He left, I think, that day, or he left the following morning.

Mr. Sherman: Now, with the Court's permission, if I may, I would like to ask this witness some questions on direct examination.

The Court: Very well. You will call him on direct.

ALBERT C. WHITE

called as a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sherman:

- Q. About when did Mr. Robert Easton come to work for White-Ahlgren Company? [173]
- A. Mr. Easton came down, I believe, either the latter part of March or the first of April, if my memory serves me correct.

The Court: Who was Easton now?

The Witness: He was field bookkeeper or job bookkeeper up on the job, or cost account man.

- Q. (By Mr. Sherman): When did he come on the job in relation to Mr. Hoover?
 - A. I believe he came after Mr. Hoover.
- Q. Do you know the circumstances under which Mr. Easton was hired by White-Ahlgren?
- A. No, I don't. I believe Mr. Hoover was instrumental in bringing Mr. Easton into the office. The particulars of it I am not familiar with.
- Q. Now during the time that Mrs. Cole was acting as trustee of the joint control account, did you have any discussions with her concerning the daily progress of the job?

 A. Yes, I did.
 - Q. What would you discuss in such discussions?

- A. In discussing the daily progress of the job with Mrs. Cole, it was how many yards of concrete had been placed, how many units had been poured, or finished, as far as the concrete work was concerned.
- Q. Did you discuss with her the number of men used on [174] the job?
 - A. I believe a time or two we did, yes, sir.
- Q. Now you are familiar, I believe, with the letter of March 23rd which Mr. Oakes wrote, the letter concerning White-Ahlgren falling behind on the job? A. Yes, sir.
- Q. Would you please explain to the Court what brought that about, what the difficulty was?
- A. The difficulty that necessitated Mr. Oakes writing that letter is a question that is debatable in this respect, I would say between a developer and a subcontractor. They felt that we weren't pouring as many units as we actually should pour per day. They felt that we were falling behind on our contract and that we were on the verge of default.
- Q. Did you ever make a determination that the job had been underbid?
 - A. Had we ever made a determination?
- Q. Did you ever make a determination that the job had been underbid? A. Oh, yes, sir.
 - Q. When was that determination made?
- A. Along about the middle of February, I believe.
 - Q. What was the nature of the determination?

I mean, what took place that led you to the conclusion that that job had been underbid? [175]

A. All the garage elements that went with these units, they were 10-car garages——

The Court: 10-car?

The Witness: 10-car garages, yes, sir.

On the plans that were sent in here to the Weeks Engineering Company, Inc., who handled all the estimating, material estimating, it showed that the garages and driveways to the garages were to be in asphalt construction, but the set of plans that we were given by Marine Development to build the job by showed the driveways and the garage slabs in concrete, which meant that we poured 2,100 yards of concrete, plus the labor, plus the extra materials that went with it, for which we did not draw any money for.

The Court: You mean for each unit or for the total job?

The Witness: The total job, sir. I believe our estimates showed we had poured in addition 2,100 yards of concrete that we did not draw money for.

Q. (By Mr. Sherman): So if you stuck to your original contract price you would come out short?

A. That we would have come out short?

Q. Yes.

A. That I couldn't answer you truthfully.

The Court: You did come out short? [176]

The Witness: Yes, we did, very short.

Q. (By Mr. Sherman): Did you communicate

to any representative of Century Indemnity your determination in this regard?

- A. I don't believe I follow you, Mr. Sherman.
- Q. Did you tell anybody who was acting for Century Indemnity Company about this?
 - A. About this shortage?
 - Q. Yes, sir.
- A. Oh, yes. We notified Mrs. Cole immediately upon determining that we were short.
- Q. Then this Oakes letter thing broke, is that correct?
- A. Well, that came after our determination that we were short on the bid, yes.
- Q. It was after all of that had taken place that signing individual payrolls at the job site commenced?
- A. No. The part of signing the checks on the job site came shortly, as a matter of fact, the next payroll period, the next weekly period after these checks here were started, which necessitated Mrs. Cole——
 - Q. These checks were in January.
- A. Well, then, if my memory serves me correct, she came down then for the very next payroll period, I am sure, and started the countersigning on the job site.
- Q. Does it refresh your recollection at all as to whether [177] or not before she did that she paid net instead of gross and then started countersigning at the job site, does that refresh your recollection at all?

- A. I don't remember whether or not we drew on the net or the gross side from the very beginning. I am not sure. I don't remember.
- Q. It was after all that happened that Mr. Van Tassel first appeared on the job, is that correct?
 - A. Yes; that is true.

Mr. Sherman: May we have this assignment dated May 28, 1954, marked Plaintiff's Exhibit 27 for identification?

The Court: Is that the same number it has in the pretrial order?

Mr. Sherman: That is correct, your Honor.

The Court: It will be so marked.

(The document referred to was marked as Plaintiff's Exhibit No. 27 for identification.)

The Court: I think it is in evidence.

Mr. Sherman: No, it is not, your Honor.

- Q. Mr. White, I hand you that which has been marked Plaintiff's Exhibit 27 for identification and I ask you if you recognize that?
 - A. Yes; I recognize it.
- Q. Would you please tell the Court what that is? [178]
- A. This job was the Crevette Construction Company, we always referred to it as the Webb & Knapp job; I knew they had another name but it slipped my mind, so it is Crevette when we speak of Webb & Knapp.

Prior to my going into the organization down there they had a contract with Crevette Construc(Testimony of Albert C. White.) tion Company and it was near completion when I

came on the scene.

They had a system of holding back a 10% retention clause, and then when the Webb & Knapp job was completed, or shall we say as near completion as we can get to be able to draw some of this money, we had certain monies coming under the 10% retention clause for which we signed over our rights to The Century Indemnity Company to go into their funds to supplement anything perhaps they had paid out.

- Q. That is an assignment of White-Ahlgren's rights to receive any further payment?
 - A. That is right.
- Q. Did that assignment take place after Century's representatives were informed about the underbidding?
- A. Yes, it was. This is dated August 19th. It would have to be after that date.
 - Q. May or August?
- A. This says here on or about August [179] 19th.

* * *

- Q. Did you have a conversation with Mr. Van Tassel in which he told you that whatever income from any source White-Ahlgren was going to get they would have to transfer it over to Century?
- A. I had a discussion with Mr. Van Tassel and Mr. Waite both along those lines after we realized that we were going to have to draw on Century

Indemnity to pay the bills. I think they both pointed out to me at that time that whatever income, whatever profits or whatever source of revenue or collateral we had naturally would have to go to them in payment for what we had drawn on.

The Court: Did Century Indemnity advance money to complete the job?

The Witness: Yes, sir; they did.

The Court: How much?

The Witness: I am not sure of the amount, sir.

Mr. Burford: That is stipulated to, your [183] Honor.

The Court: It is a thousand dollars?

Mr. Burford: It was \$119,000. The thousand dollars was the amount that was paid to complete the last payroll.

Mr. Sherman: They paid, I think, materialmen's bills and then the last payroll.

- Q. Did you ever promise Mr. Van Tassel or any other member of Century Indemnity Company that you, meaning White-Ahlgren, would pay the Federal taxes?
- A. No, I don't ever recall making that statement.
- Q. Did you ever tell Mr. Van Tassel or any member of The Century Indemnity Company that you were going to get extra money from Marine Development for these cement slabs that you laid and would pay the taxes from that?
- A. No, sir, I never told them we were going to get any money, although we had discussed it a

lot of times as a mere hope that it might be possible, but we never made any promises with that in mind, that we knew we were going to draw that money.

- Q. Was Mr. Van Tassel present in these conversations concerning this hope?
- A. Yes, he was. Mr. Van Tassel was present with myself in a meeting with Mr. Fritz Hahn and their attorney at one time concerning these slabs.

Mr. Sherman: No further questions, your [184] Honor.

Cross-Examination

By Mr. Burford:

Q. Mr. White, my cross-examination will be quite brief at this point.

I want to direct your attention to the question of the discharge of Mr. Ray.

Now as I understand what you testified to, there was a meeting with Marine Development where Marine Development insisted that Mr. Ray be supplanted by another man who would be directly accountable to Marine Development.

A. That is right.

Mr. Sherman: I will object to this question on the ground that this is something that was raised on direct, this is not something that we raised on our direct of this witness. This is presumably crossexamination of the matters raised on direct.

If the government is to be held to a strict line on that I believe it is only proper to hold plaintiff to such a line, too. He is merely re-going over matters he raised on direct.

The Court: He hasn't asked a question yet. He is just reciting his understanding of what the witness testified to.

Mr. Sherman: But that is pertaining to the topic that he raised.

The Court: Maybe his question will relate to some new [185] matter.

Mr. Sherman: Very well.

Mr. Burford: Well, your Honor, it does relate to the clarification of the statement of the witness with respect to who told Mr. Ray that he would leave.

Mr. Sherman: Then my objection stands.

The Court: The objection is overruled. Ask your question.

- Q. (By Mr. Burford): Mr. White, when Mr. Van Tassel came out of the Marine Development office you testified that he discussed this ultimatum of Marine Development with Mr. Ahlgren and Mr. Ray was present, is that correct?
 - A. That is right.
- Q. Was any conclusion reached in connection with that discussion?

Mr. Sherman: I will object to the form of the question, your Honor.

The Court: It calls for a conclusion.

Q. (By Mr. Burford): What was the result of that discussion?

A. Well, the result of the discussion was the fact that Mr. Ray would no longer be there and Mr. Jones, I guess his name is, would have to take his place.

The Court: Did Mr. Jones take his place the next day? [186]

The Witness: I believe it was the very next morning Mr. Jones was brought in.

Q. (By Mr. Burford): To your knowledge did Mr. Van Tassel have any right to hire or fire employees of White-Ahlgren?

Mr. Sherman: Now I will object to that, your Honor. It calls for a conclusion of this witness. We have had testimony as to what was done. Now this question is saying did he have the right to do what he did. I don't believe that is proper.

Mr. Burford: We have testimony, your Honor, as to what happened, but we haven't quite cleared up what was done, as I understand it.

The Court: Your question here is whether or not this witness has any knowledge of whether or not Mr. Van Tassel had the right.

Mr. Burford: Yes.

The Court: Overruled.

Do you know whether or not he had the right? The Witness: Whether Mr. Van Tassel had the right to hire or fire?

The Court: To hire or fire any person.

The Witness: No, Mr. Van Tassel didn't have the right to hire and fire. [187]

- Q. (By Mr. Burford): Did Mr. Ahlgren, to your knowledge, have the right?
 - A. Yes, Mr. Ahlgren had the right.
 - Q. And he was present at that time?
 - A. Yes, that is right.

Mr. Burford: May I have a brief moment, your Honor?

(Conference between counsel.)

Mr. Burford: No further questions, your Honor.

Mr. Sherman: No further questions.

The Court: This witness is excused. [188]

* * *

BURTON A. VAN TASSEL

a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: Burton A. Van Tassel; V-a-n T-a-s-s-e-l.

The Clerk: Your address, please, business.

The Witness: 900 Wilshire Boulevard.

The Court: And your first name?

The Witness: Burton, B-u-r-t-o-n. [192]

Direct Examination

By Mr. Burford:

Q. Mr. Van Tassel, you are an attorney here in Los Angeles? A. I am.

- Q. Are you a member of a firm? A. Yes.
- Q. What is that?
- A. Nicholas, Kolliner & Van Tassel.
- Q. Mr. Van Tassel, directing your attention to the end of 1953 and during 1954, was The Century Indemnity Company at that time one of your clients?

 A. Yes.
- Q. You are familiar, of course, with the contract here in issue between Marine Development and White-Ahlgren? A. I am.
- Q. Will you state for the Court approximately when that contract and the surety bond between the subcontractor and Century Indemnity first came to your attention?
 - A. About March 30, 1954.
- Q. Under what circumstances did this come to your attention?
- A. On that date, as I recall, Eva Cole, Mr. D. J. Waite and Albert C. White came to my office—
 - Q. Why did they come? [193]

Mr. Sherman: I will object to that, your Honor. That calls for a conclusion of this witness.

The Court: Objection sustained.

- Q. (By Mr. Burford): What happened when they came?
- A. They showed to me a letter that was written—

The Court: Who was this that came to you now? The Witness: That was Eva Cole, D. J. Waite and Albert C. White.

The Court: Now let me get again in my mind,

I was making some catch-up notes, your relationship to this matter. You are a lawyer?

The Witness: I am a lawyer.

The Court: You are counsel for whom?

The Witness: For The Century Indemnity Company, the plaintiff here.

The Court: For The Century Indemnity Company?

The Witness: Yes.

The Court: Very well.

The Witness: At the time they arrived they showed to me a letter addressed to Eva Cole written by Robert Oakes, an attorney in San Diego.

- Q. (By Mr. Burford): Mr. Van Tassel, I show you Plaintiff's Exhibit 10, on the letterhead of Oakes & Horton. Is this the letter to [194] which you refer? A. It is.
- Q. What discussion took place at that conference?
- A. Well, at that time they informed me that the meeting referred to in the letter had taken place, that Mr. Oakes as attorney for Marine Development had issued the letter and had sent the letter and was asking that The Century Indemnity Company execute it in the space provided, which would have completed the signatures of all of the parties referred to in the letter.
- Q. Did you discuss with any of these participants at that conference the reason for the letter?
- A. Yes. The rate of progress, it was claimed by Marine Development Company——

The Court: Have you got that letter there?

The Witness: Yes, I have it.

(The exhibit referred to was passed to the Court.)

The Court: Do you need it?

The Witness: No, I don't.

The rate of progress of the work, according to Marine Development, had been slowed down and they were complaining about that and were submitting a reduced schedule or modified schedule together with a proposed program of paying a payroll of White-Ahlgren as the work progressed by the week instead of [195] by the month.

Do you want me to proceed?

- Q. (By Mr. Burford): When you say "payroll," you mean progress payment of Marine Development to be accelerated to weekly rather than monthly, is that what you mean?
 - A. That is what I mean, yes.
- Q. After this conference what action did you take then?
- A. I promptly got in touch with The Century Indemnity Company——

The Court: Did you execute the letter?

The Witness: No.

The Court: It never was executed?

The Witness: It never was executed.

The Court: By you or Century Indemnity?

The Witness: That is correct.

Q. (By Mr. Burford): Perhaps, Mr. Van Tas-

(Testimony of Burton A. Van Tassel.) sel, you would like to explain for the benefit of the Court at this time why the letter was never executed.

A. I would, with the Court's permission.

The Court: It calls for his conclusion. Very well, you may.

The Witness: Following—I am trying to give this in a brief, chronological outline of what occurred—following the [196] meeting, aside from getting in touch with The Century Indemnity Company and being notified by them that they could give no immediate answer on this, because this bond was reinsured and they would have to get in touch with their reinsurers, I had communication back and forth, both verbally and by letter, with Mr. Oakes, attorney for the Marine Development Company, and then, as I recall on April 9th, I went down to Camp Pendleton for the first time and met White and Ahlgren, and from there went on down to San Diego by appointment to meet with Mr. Oakes.

At that time in discussing the matter with him I pointed out the different stages of work which had to be performed, some 12 in number, as I recall, separate operations, your Honor, and from the report made to me by Mr. White and Mr. Ahlgren the work was sufficiently in advance of the next trade—I believe they were the carpenters or plumbers—so that there was, in fact, no real slowdown as far as Marine Development was concerned.

While I was there Mr. Oakes received a telephone call from Mr. Summers of Marine Development at

Camp Pendleton and then informed me following that phone call that Mr. Summers agreed that there was no emergency in this situation, that he was pleased with the progress that had been made and that there was no insistence on the part of Mr. Summers that the letter provided here as the Plaintiff's exhibit be executed by The [197] Century Indemnity Company, and it never was executed by them.

- Q. (By Mr. Burford): Did the arrangement with respect to the schedule of work and progress payments insofar as you know, as outlined in that letter, remain in effect?
- A. Yes. They continued to make the payments, the progress payments, on a weekly basis rather than on a monthly basis.
- Q. Following that conference, I believe you said it was April 9th——
 - A. That is my recollection.
- Q. ——did you become one of the authorized signators to sign as trustee for Century Indemnity?
 - A. I did.
- Q. That would be as set forth in Exhibit 4-C of the plaintiff.

Thereafter, Mr. Van Tassel——

The Court: Let me see, that was on what date now?

(The exhibit referred to was passed to the Court.)

The Court: Well, as near as I can read this the date is April 19, 1954.

Mr. Burford: That is our understanding, your Honor, that on or about that date Mr. Van Tassel became one of the authorized signators to sign as trustee on behalf of Century [198] Indemnity.

The Court: Go ahead.

- Q. (By Mr. Burford): Now, Mr. Van Tassel, following this conference of April 9th and your having to become an authorized signator on this White-Ahlgren trust account, what was your method of operation with respect to White-Ahlgren and the signing of checks?
- A. The payroll checks were signed on Friday of each week, and generally I came down, I went down to Camp Pendleton on Friday morning and arrived there normally in the mid-morning, and inquired as to what problems they might have to discuss and if the estimate had been prepared for the work done for the past week, and then the payroll recap, a copy of it, was furnished to me by Mrs. Higgins, the bookkeeper, the payroll checks had all been prepared as listed on this payroll recap, and it was my practice to check on the name, in other words, examine the name of each individual worker, employee, of White-Ahlgren, to be certain that the list and the check, the payee of the check, corresponded and that the net amount of the check as shown on the recap list and on the check corresponded, and having done so one by one I would check them off as I went down the list and would countersign the checks.

- Q. What did you do with the checks after you countersigned them? [199]
- A. I don't recall that I did anything with them. It was a matter of Mr. White or Mr. Ahlgren taking the checks then and either personally delivering them or handing them to one of the foremen.

The Court: You just left the checks there?
The Witness: I just left the checks there.

- Q. (By Mr. Burford): Now, Mr. Van Tassel, did you countersign any checks for any purposes other than for payroll?

 A. Yes.
 - Q. What sort of checks were those?
- A. Those would be checks on account of material bills incurred.
- Q. How did you determine which checks for material bills to countersign?
- A. That was by mutual understanding between White and Ahlgren and myself as to which bills should be paid. There never was enough money to pay on all the outstanding bills.

The Court: How do you mean, what process did you take? Were there invoices there?

The Witness: There were invoices.

The Court: Did you check to see whether or not the material was delivered under the invoices?

The Witness: No, I had to take their word.

The Court: You accepted their word? [200]

The Witness: To the effect that it was a proper bill. But there were some bills, your Honor, such as repair bills on equipment, where we didn't expect to have to use it.

The Court: Then you took the bills and sorted them out and put in the bills you would pay now, next week and wait?

The Witness: In a general sense that was the way we handled it. There wasn't enough money to pay them all and it was a case of choosing bills which we felt we would necessarily have to make some payment on in order to keep the credit good because there would have to be some more material ordered, and White and Ahlgren are more familiar with that than I, and we simply discussed it and determined by mutual agreement which ones should have the payment made on account.

The Court: Whose decision in that was the final decision? Did you accept their recommendation or did you override their recommendation as to which bills should be paid or delayed?

The Witness: I would concur with their suggestion in that regard because they were the ones who were familiar with the payment of which bills were necessary in order to keep the job going.

The Court: Did you ever make a suggestion to them that such and such a bill should be paid as against another bill?

The Witness: Oh, I think I perhaps did on occasion.

The Court: And did they accept it?

The Witness: Yes. [201]

Q. (By Mr. Burford): Who would be your main material suppliers on this job, Mr. Van Tassel, not necessarily the name but the type of material?

A. The principal material supplier was Neslo Corporation, which supplied the mixed concrete. Their bill was always the largest.

Then there was the Rohl Company, who supplied crushed rock.

Aside from those there were bills for a particular type of paper required in pouring the building slabs and there was reinforcing steel, lumber for the concrete forms.

Those were the general ones which I recall.

- Q. How were these bills ordinarily, let's say, by the two largest suppliers, Neslo and Rohl, daily, monthly, weekly, or what? A. Monthly.
 - Q. They were billed monthly? A. Yes.
- Q. Did you ever have any discussion with either Neslo or Rohl about the payment of their bills during this period?
 - A. You mean during the period of the job?
 - Q. Yes, during the period of the job.
 - A. Yes, I did.
- Q. What sort of discussion did you have with them? [202]
- A. At one juncture, as I recall, it was along in May of that year, it could have been later, we didn't have enough money to pay their mixed concrete—I am talking about Neslo now——

The Court: Who is "we," Century?

The Witness: When I say "we," there was not enough money in the trust account so that had a check been issued against it for the full amount (Testimony of Burton A. Van Tassel.) of the material bill then due it wouldn't have cleared.

So I do recall making the request that they bear with us if we made a payment on account at that time and endeavored to pay the balance in the following week or possibly the week after that.

I had other contacts with them, as far as that is concerned, if you wish me to proceed.

Mr. Burford: Not unless his Honor would like to explore this phase of it.

The Court: No.

- Q. (By Mr. Burford): Now, Mr. Van Tassel, did you ever refuse to sign any checks that were presented to you for countersignature?
 - A. Yes, I did.
- Q. Would you give an example of that? Were there several instances?
- A. I don't recall several instances. I recall one in [203] particular.
 - Q. What would that be?
- A. That would be, as I recall, on April 30th when the payroll taxes for the first quarter of 1954 were due and payable.
- Q. Will you just state the circumstances surrounding that incident?
- A. Yes. At that time, as I recall, the payroll tax return had been prepared by Mrs. Higgins and had been signed and, if I recall it correctly, the amount was some \$11,000.
 - Q. Signed by whom?

- A. I don't recall, Mr. Burford, whether the check was already signed by anyone.
 - Q. I thought you said signed.
- A. Well, I was trying to say that the payroll tax return was, if I recall correctly, already signed.
 - Q. Excuse me.
- A. But I believe the check had been prepared at that time payable to the District Director of Internal Revenue for the amount of the taxes, Federal taxes shown on the payroll tax return.

But after we had written out checks for the payroll ending that week, to the best of my recollection, and some few minor material bills, because there wasn't very much of a draw at that time, there remained in the account, to the best of my [204] recollection, somewhere in the neighborhood of \$3,000 plus, which wouldn't have covered a tax check for roughly \$11,000.

- Q. Where did this discussion take place?
- A. That would have been in the field headquarters of White-Ahlgren, which was a little office shack, you might call it.

The Court: A construction shack?

The Witness: A construction shack on the job.

- Q. (By Mr. Burford): Do you recall who was present at that time?
- A. I believe that Mr. White and Mr. Ahlgren and Mrs. Higgins were present.
 - Q. So you did refuse to sign this check?
 - A. I did.

- Q. Because, as you testified, there were insufficient funds in the account?
 - A. That is right.
 - Q. For it to clear? A. That is right.
 - Q. What action did you recommend, if any?
- A. That they mail in the tax return even though it could not be accompanied by the check.
 - Q. Do you know whether that was done?
- A. I do not. I had no personal knowledge of it. I believe it was done. [205]
- Q. Mr. Van Tassel, in connection with the payment of these payroll checks, did you initiate that procedure?
- A. Are you talking about the countersigning of the individual payroll checks?
 - Q. Yes.
- A. No. I simply carried along on the procedure already in full force and effect at the time I came into the picture.
- Q. Now, Mr. Van Tassel, the construction shack of White-Ahlgren was on the project. Where was the Marine Development construction shack in relation to the White-Ahlgren shack?
- A. Well, it was on the tract. It was the same general tract, as far as that is concerned, perhaps three-quarters of a mile apart.
- Q. When you were in Camp Pendleton on these Fridays, would you have occasion from time to time to confer with representatives of Marine Development?
 - A. Not to any great extent. I had made it a

(Testimony of Burton A. Van Tassel.) practice of accompanying Mr. White and Mr. Ahlgren to the Marine Development Company construction shack headquarters.

- Q. Directing your attention to on or about July 2nd of 1954, did you have a conference with Marine Development representatives on or about that day?

 A. I did.
- Q. Will you state to the best of your recollection who [206] was present? A. Yes.

The Court: What date is this again now, please? The Witness: That is July 2, 1954.

The Court: Proceed.

The Witness: Mr. Hahn, Mr. Neece, Mr. Summers and Mr. Jackson, together with their attorney, Robert Oakes, and Mr. Albert C. White.

The Court: Who was Hahn and Neece and Summers and Jackson, Marine Development people?

The Witness: They were the Marine Development Company, your Honor. They are the four principals in that company.

The Court: Then there was present Mr. Ahlgren or Mr. White?

The Witness: Mr. White.

The Court: Mr. White and yourself?

The Witness: And myself.

The meeting took place in a then permanent building which was built for rental purposes to handle the rent to the people who were going to occupy these units being built, so it was then in a permanent building.

- Q. (By Mr. Burford): Where was Mr. Ahlgren, if you know?
- A. Mr. Ahlgren remained outside talking to Mr. Ray, as I recall. [207]
 - Q. Do you know why he remained outside?

Mr. Sherman: I will object to that, your Honor. That certainly calls for a conclusion of the witness.

Mr. Burford: I will withdraw the question.

- Q. How large was this room, Mr. Van Tassel?
- A. The room rather uncomfortably accommodated the seven people I have named.
 - Q. What was the subject of this conference?
- There were two or three different things that were covered. One, the Marine Development Company through Mr. Hahn as spokesman—I understood he was the present—stated that in the last week or two there had been quite a number of complaints by the inspectors, government inspectors on the job, and that it had reached the point where it was critical and that they were, in substance, notifying Century through me and White-Ahlgren through Mr. White that as an alternative to the declaring of a default on the part of White-Ahlgren they would allow them to continue the work on the subcontract, providing a man named, I believe his first name was Richard, Jones was rehired by White-Ahlgren and made directly accountable to Marine Development's job superintendent Frank Jackson.
- Q. What was the result of this, shall we say, ultimatum?

A. Mr. White and I went out and discussed the matter with Mr. Ahlgren and Mr. Ray, as I recall, and explained to them [208] that that was the alternative offered, and we concurred that there was nothing else to be done in the matter.

Q. When you say "we," you mean—

A. I mean to say Mr. White, Mr. Ahlgren and I felt that rather than have a default declared by Marine Development that the proper thing to do would be to rehire Mr. Jones.

Q. And he was rehired?

A. He was rehired.

The Court: Did he thereafter run the job and account to Mr. Richards of Marine Development, if you know?

The Witness: Mr. Jackson you mean?

The Court: Jackson, yes.

The Witness: Yes.

The Court: Did you follow the practice after that of going down every week and signing payroll checks?

The Witness: Oh, yes.

The Court: Did you talk to Jackson or White and Ahlgren?

The Witness: I talked to White and Ahlgren.

The Court: Had they talked to Jackson?

The Witness: No. I mean they didn't have any occasion to under the arrangement.

The Court: As far as you know, they didn't?
The Witness: That is right. To my knowledge

this was simply a matter of supervision, the chain

of command, so to speak, so far as the performance of the work on the job was [209] concerned, but with respect to payment of bills, material bills and payment of the payroll, there was no outward change.

The Court: I see.

Q. (By Mr. Burford): Mr. Van Tassel, did you ever have any authority to hire or fire the persons whose payroll checks you were countersigning?

Mr. Sherman: I will object to that, your Honor. It certainly calls for a conclusion of this witness, and the very conduct testified to by the witness speaks for whether or not the witness had authority without his conclusion otherwise whether he did or not.

The Court: I think the objection will be sustained. You can ask him whether or not he ever did hire or fire anybody.

Q. (By Mr. Burford): Did you ever hire or fire any employees whose payroll check you were countersigning?

A. No.

The Court: Did you ever know any of them? The Witness: No.

- Q. (By Mr. Burford): Did you have anything to do with fixing—
- A. I beg your pardon. To clarify the answer, your Honor, there were a few of the people, such as Mr. White, Mr. Ahlgren, Mrs. Clausen, Johnnie Ray, who was a foreman, and one [210] or two others that I knew by sight and name, but in the

(Testimony of Burton A. Van Tassel.)
main they were workers, many of them Mexicans,
and I wouldn't have known one from the other.

- Q. (By Mr. Burford): Did you ever have anything to do with fixing their rates of pay?
 - A. I did not.
 - Q. Their hours of work? A. I did not.
 - Q. The method of their operations?
 - A. I did not.
- Q. Did you ever supervise any of these employees? A. I did not.
- Q. Mr. Van Tassel, to your knowledge, did White-Ahlgren complete the subcontract here in question? A. Yes.

The Court: When?

The Witness: About September 20, 1954.

The Court: There is another signature card here dated, following this one of April 19th, and on the April 19th card it says, "Superseded by a new card June 15, 1954," and here is a card that says "June 15, 1954, substituted," and this is Exhibit No. 4-D, and it appears to bear your signature.

Can you tell the occasion or the circumstances of that signature card, how it happened? It is on the same [211] account, is it not, the White-Ahlgren Trust Account No. 1?

Mr. Burford: Do you have Exhibit 4-C there, your Honor?

(The document referred to was passed to Counsel.)

Mr. Burford: I think there was a change of trustees.

If your Honor please, I believe that there was a change in the trustees. We agree to stipulate, however, that a representative of The Century Indemnity Company at all times here material was required as a co-signator.

The Court: Yes, but I thought there might be some circumstances which occurred in June.

The Witness: I believe I can explain that, your Honor.

The Court: Yes?

The Witness: Upon examination of these two cards I notice that the same signators appear thereon except that the April 19th card shows the name of Robert H. Easton as one of the named trustees and his countersignature appears thereon.

The Court: He is omitted——

The Witness: He is omitted on the second one.

The Court: ——on the June card?

The Witness: That is right.

- Q. (By Mr. Burford): Mr. Van Tassel, do you know who Mr. Easton was?
- A. Yes, he was a man whom I understood was performing the duties of a cost accountant and worked in the White-Ahlgren [212] construction shack for White-Ahlgren.
- Q. Do you know why he was placed on the signature card as an authorized co-signator?

Mr. Sherman: I will object to that. That is certainly calling for a conclusion of this witness, your Honor.

The Court: Were there any conversations with anybody?

Mr. Sherman: Pardon me?

The Court: I think that that calls for a conclusion but I will overrule the objection.

Mr. Sherman: I think a foundation should be laid first, your Honor.

The Witness: May I answer?

The Court: Yes, you may answer.

The Witness: To the best of my recollection that was ahead of our opening up the so-called termination account by mutual agreement between White and Ahlgren and Century.

The Court: What is a termination agreement?

The Witness: The termination account, your Honor. An account was opened up at the Carlsbad branch of the same bank, the Security Trust & Savings Bank, which could be used for the payment of wages to employees who either quit or were fired during the mid-week and, to the best of my recollection at this point, that was the occasion for having Easton's name on as trustee for Century because we felt that there should be somebody there ahead of opening up that termination account [213] to countersign checks when they wanted to pay off.

The Court: Was he your agent?

The Witness: Well, he acted as our agent at that time temporarily.

Q. (By Mr. Burford): For that purpose?

A. For that purpose.

Mr. Burford: No further questions.

Cross-Examination

By Mr. Sherman:

- Q. It is true, is it not, sir, that at all times in all of your dealings with the White-Ahlgren company and in all of your dealings with the Marine Development Company that you were acting on behalf of The Century Indemnity Company?
 - A. Yes, I think that is a fair statement.
- Q. In your dealings with the Marine Development Company——
- A. I beg your pardon. I wish to make one clarification, if I may.
 - Q. Very well.
- A. At the time of the July 2nd meeting—and this is an error on my part, your Honor—in response to the direct examination regarding the July 2nd meeting with Hahn, Neece, Summers, et al., at the time of that meeting there was a discussion with respect to an allowance to White-Ahlgren on [214] account of putting in garage slabs which they said they had not been paid for, and in the sense that White-Ahlgren had no attorney representing them and that Marine Development had Mr. Oakes there representing them, I believe it is proper to say that I was representing White-Ahlgren in part at that time.

The Court: In the capacity of counsel?

The Witness: In the capacity of counsel, yes.

The Court: In relation to that matter?

The Witness: In relation to that matter.

- Q. (By Mr. Sherman): Now at that time, at the time of that July 2nd meeting at which garage slabs were discussed, was there a difference of opinion between the White-Ahlgren people and the Marine Development people as to how much was due White-Ahlgren on the job and what kind of slabs they were supposed to pour?
- A. I don't recall any difference—well, yes. When you say the kind of slabs.

There had been a contention on the part of White-Ahlgren in the very inception, in my acquaintance with this matter, that they had bid, had submitted their bid to Marine Development for this concrete subcontract predicated upon asphalt garage slabs rather than concrete garage slabs; that after the estimate had been made and the bid submitted that the blueprints had to be returned to the 11th Naval District in San Diego, and they were not able, they informed me—they [215] meaning White-Ahlgren —they were not able to trace down the location of these original blueprints, but in any event the ones that Marine Development presented to them for their work on the project did not contain the same blueprints and did provide that they must be concrete slabs rather than asphalt slabs for the garages.

- Q. Concrete slabs would be installed at a higher cost than the asphalt?
- A. That is my understanding, that they would be, yes.

Q. You were informed about this at the time that, shall we say, you came into the picture in this matter?

A. That is correct.

The Court: In March?

The Witness: In March.

- Q. (By Mr. Sherman): At that time were you also made aware of the fact that if they had to pour concrete instead of asphalt the cost would be such as to result in an underbidding of the job and they would come out with a loss rather than a profit?
 - A. At which time are you referring to?
- Q. At the time that you were informed about this difference between Ahlgren's view as to what they had to pour and Marine Development's view.
 - A. Do you mean in July now or March?
 - Q. In March, shall we say. [216]
 - A. In March I was not so informed.
- Q. When did you first learn that the pouring of concrete instead of asphalt slabs would result in an underbidding and consequent loss on the subcontract?
- A. It might have been a month later. I can't recall that precisely.
 - Q. Somewhere around the period of April?
 - A. It could have been.
- Q. At least definitely prior to this July 2nd meeting? A. Yes.
- Q. Now in this discussion with Marine Development concerning these garage slabs, in which you say you acted for White-Ahlgren, did you attempt

(Testimony of Burton A. Van Tassel.) at that time to get Marine Development to agree to additional payments on the subcontract?

- A. I did.
- Q. In that connection did Marine Development agree to make such additional payments?
- A. They did not. They left it hanging in abeyance, if you please.
- Q. Did they ever agree to make such additional payments?

 A. May I explain my answer?

The Court: Yes, you may.

The Witness: I informed Mr. Hahn at the time of this July 2nd meeting that before we discussed anything else I wished to ask them about payment to White-Ahlgren for the garage slabs. [217] He said, we have this critical situation so far as the stage of the work is concerned here now, the complaint of the inspectors and all, and I will only answer you in this way, that if you and White-Ahlgren agree to this arrangement of putting Jones in as accountable to Jackson and the work is satisfactorily completed by White-Ahlgren, their contract is completed, we will then reconsider, but I want to make it clear.

The Court: Reconsider what?

The Witness: Reconsider allowing something to them on account of these garage slabs they were claiming they were not paid for.

But he said, I want to make it clear that I am not committing myself to pay a dime at this time or at any future time.

Mr. Sherman: Mr. Stacey, may I have Plaintiff's Exhibit 28 for identification?

(The exhibit referred to was passed to Counsel.)

Mr. Sherman: Is this marked Plaintiff's Exhibit 28 for identification, Mr. Clerk?

The Clerk: Yes.

Q. (By Mr. Sherman): Mr. Van Tassel, I now show you a letter addressed to you by Robert A. Oakes, copy of a letter, under date of [218] October 7, 1954. Was that a letter that you received from Mr. Oakes in connection with this garage slab matter?

A. It is.

The Court: That is after the completion of the contract?

Mr. Sherman: That is correct, your Honor.

The Witness: Yes, that is right. [219]

* * *

Q. At the time of that July 2nd meeting when additional money from Marine Development was discussed——

The Court: For the slabs?

Mr. Sherman: For the slabs, and this witness testified——

The Court: I know what he testified to.

Q. (By Mr. Sherman): Is it not a fact that prior thereto White-Ahlgren had notified you as the representative of Century that they could not pay their suppliers' bills and that Century In-

(Testimony of Burton A. Van Tassel.) demnity out of its own funds had paid material men in the sum of approximately \$66,000?

- A. That is correct.
- Q. Therefore at the time of this discussion with the Marine Development people for additional sums, Century Indemnity already knew, did it not, that it would have to pay amounts under the bond directly?
 - A. Would you read that question back?
 (Question read.)
- A. Your question isn't clear, Mr. [221] Sherman.
 - Q. All right.

Did not Century Indemnity at that time know that it would have to make good its obligation under the bond and pay suppliers from its own funds?

A. I don't think there is any question about that.

The Court: Did Century Indemnity ultimately pay suppliers under this bond?

The Witness: Yes, your Honor.

The Court: How much?

The Witness: Approximately \$119,000.

The Court: Those were all suppliers?

The Witness: Yes.

The Court: Did that include any money paid back to Marine Development?

Mr. Sherman: There were no funds paid back to Marine Development.

The Court: I am asking him.

The Witness: There were no funds paid back, your Honor, to Marine Development. There was some recovery made by Century Indemnity Company.

The Court: From whom?

Mr. Sherman: From Marine Development.

The Witness: From Marine Development Company, the retention payment of some \$54,000, together with other recoveries which were made from the White-Ahlgren people or for their [222] account. That is contained in the pretrial conference order, your Honor.

The Court: All right.

Q. (By Mr. Sherman): Now with respect to this letter of March 24th from Mr. Oakes to Eva Cole, Plaintiff's Exhibit 10, are you familiar with it without seeing the document, sir?

The Court: March 24th?

Mr. Sherman: Yes, March 24th or 23rd.

The Court: March 23rd.

The Witness: Yes.

- Q. (By Mr. Sherman): Is it a fact, sir, that the letter first exhibited to you by Mr. Waite and Mrs. Cole is not the same letter as Plaintiff's Exhibit 10?
- A. I think it is not a fact. In other words, this is the same letter to my knowledge that was originally exhibited to me.
- Q. When you first learned about the letter, is it not a fact that you had consultations with Mr. Oakes, the attorney for Marine Development, con-

(Testimony of Burton A. Van Tassel.) cerning certain revisions in the letter which you wished to have?

- A. No question about that.
- Q. Were those revisions then further discussed with Mr. Oakes and a compromise revision was made between you? [223] A. Naturally.
- Q. Is Plaintiff's Exhibit 10 the letter issued after these conferences between you and Mr. Oakes and the compromise revisions?
 - A. It is not. It is dated March 23rd.
 - Q. Pardon me?
- A. My discussions with Mr. Oakes, Mr. Sherman, for the sake of clarity, all took place after March 23rd.
 - Q. I understand that.
- A. My meeting with them on April 9th was after March 23rd. This letter is dated March 23rd.
- Q. I understand that. But my question to you, sir, is this: Although dated March 23rd, is it not a fact that the language of this letter is in the form of the compromise revision agreed to between you and Mr. Oakes after you first saw the original March 23rd letter?
 - A. May I examine the letter, your Honor? The Court: Yes.

(The exhibit referred to was passed to the witness.)

The Witness: It is not. We never agreed to any negotiations nor had any understanding with re-

(Testimony of Burton A. Van Tassel.) spect to the 24-hour period referred to in that letter, and this was the original letter. [224]

- Q. (By Mr. Sherman): Is it not a fact, Mr. Van Tassel, that although this letter of March 23rd is not signed by Century Indemnity Company its contents were agreed to and ratified by you as the attorney for Century Indemnity?
 - A. That is not a fact.
- Q. It is a fact, however, is it not, that after this letter Marine Development did step up its progress payments in accordance with the letter?
 - A. That is true.
- Q. Is it also not a fact, sir, that after the work schedule which White-Ahlgren was required to complete was reduced in accordance with the terms of the letter?

 A. That is right.
- Q. Did you at any time voice any objection to that?
- A. No. This was a verbal understanding between Mr. Oakes and myself that there need be no occasion for the executing of this letter by Century Indemnity Company in view of the satisfaction Mr. Summers expressed in his telephone call to Mr. Oakes.
- Q. Even though they were, as you testified, satisfied that there was no default, yet the recommendation specified in the letter was, in fact, carried out?
- A. The weekly payrolls and the modification of the rate of work, yes. [225]
- Q. Now is it not a fact, sir, that in your weekly trips to the job site you would discuss with Marine

Development people the extent and nature of the progress on the job being made?

A. Not particularly with them, no. There would be an estimate sheet made up by Mrs. Higgins reflecting the work that had been estimated as being performed during the past week, which estimate sheet would at the time of the mid-afternoon meeting be presented to Marine Development Company.

At that time there might be some discussion possibly with regard to the amount of work done.

- Q. These meetings were customarily held in your presence when you would come down once a week?
 - A. That is correct.

I would be present at the meeting.

- Q. And it would be held on the day that you happened to be there?

 A. That is right.
- Q. And all discussions concerning the job would be made in your presence at those meetings?

Mr. Burford: That is a little broad, your Honor.

The Court: Yes, a little broad, I would say, all the discussions concerning the job.

Mr. Sherman: Let me reframe it.

The Court: He said he was only there once a week and I [226] suppose the other people were there every day.

The Witness: That is correct.

Q. (By Mr. Sherman): You were present throughout these meetings when they would take place on those days that you were there, in other words, on a given day when a meeting was held and (Testimony of Burton A. Van Tassel.) you were there you would be present throughout the meeting?

A. Your question is not clear, Mr. Sherman.

Mr. Burford: What meeting?

The Court: Let me have the question read.

(Question read.)

The Court: The question is not clear. All you are saying is you were there when you were there.

Mr. Sherman: No; all I am trying to establish through the witness is when he was present at these meetings.

Mr. Burford: What meetings, your Honor?

Mr. Sherman: His presence would be there throughout the meeting, not that he would walk in for a few moments and discuss something and walk out and not be there the balance of the meeting.

The Court: Do you know?

The Witness: No; I would be there for the duration of the meeting, however long it was. They were never very long.

The Court: What meeting? Do you know whether or not they had another meeting when you weren't there? [227]

The Witness: Yes, there were occasions when I did not go down there, your Honor. Mr. Waite occasionally went down.

The Court: Did they have a meeting between the Marine Development Company and White-Ahlgren or the various employees that you weren't there?

The Witness: That is entirely possible, sir.

Mr. Sherman: The only thing I am trying to establish, your Honor, is when he was present at meetings he was present throughout the length of those meetings and there were no meetings at which he left and in which the discussion continued.

The Court: How can you tell what happened when he wasn't there?

Mr. Sherman: He can tell, your Honor, when he walked out whether the parties were still talking or not.

The Witness: I can clear it up very quickly, Mr. Sherman. There were no meetings that I recall where I ever walked out.

Mr. Sherman: All right.

- Q. In your discussion with the Marine Development people concerning what they allege to be this default, did they not indicate to you that the reason for the difficulty which they maintained existed was due to White-Ahlgren's insufficient capital?
 - A. At what time are you referring to, please?
- Q. At the time of your discussion with the Marine Development people concerning White-Ahlgren's alleged falling [228] behind on its progress in completing the job, the March, 1954, situation.
- A. Your question isn't clear yet. Are you talking about the time when I met with Mr. Oakes down in his office?
- Q. I am talking about the time when in your presence Mr. Oakes received a telephone call from Mr. Summers. A. All right.

- Q. Now at that time did any member of Marine Development who was present indicate to you that White-Ahlgren had fallen behind because of insufficient working capital?
- A. Mr. Sherman, Mr. Oakes and I were the only ones present. It was in his law office.
 - Q. Did he so indicate to you?
- A. I have no recollection of any such indication by him.
- Q. Now with reference to the procedure instituted of meeting the payrolls—
- A. May I correct my last answer? I am trying to think back six years.

There may have been a discussion at the time, some comment made, in Mr. Oakes' office by Mr. Oakes to the effect that since White-Ahlgren are in need of funds we will agree on not only the modification of the progress of the work, but paying them by the week.

I think that could well have happened, but I don't [229] have any particular recollection of precisely what was said.

- Q. Now the procedure which you say you continued of going down to the job site and countersigning the individual checks against the trust account, to your knowledge do you know who initiated that procedure?
 - A. I think that Mrs. Cole did.
- Q. With respect to the rates of pay, to your knowledge, were not those rates fixed by union scale?

 A. I didn't check as to that.

- Q. You don't know? A. No.
- Q. It is possible that they were?
- A. It is possible.
- Q. So that even White-Ahlgren didn't determine that?

The Court: Why don't you sue the union then? Mr. Sherman: Your Honor, we are not suing anybody; we are being sued.

The Court: Very well. Why didn't you levy the assessment against the union if they are the real employer?

Mr. Sherman: We are not saying the union was the real employer. One who fixes the rate of pay but does not have the money is not the real employer. We feel that Century, having the money and having acted as it did, is the real employer and hence should pay.

I am merely trying to bring out at this point, your [230] Honor, the fact that this witness said he didn't fix the rate of pay. I am trying to show that maybe the rate of pay was not fixed by White-Ahlgren, either; that maybe it was the union scale.

- Q. Now, sir, you were furnished on each occasion payroll sheets, recap sheets by Mrs. Higgins, were you not?
 - A. You refer to them as recap sheets—
 - Q. Payroll recap sheets.
- A. Yes. To the best of my knowledge I received one every time I went down.
- Q. With respect to people on the payroll, in addition to those you mention, you knew Mr. Ray,

(Testimony of Burton A. Van Tassel.) did you not?

A. I knew him.

- Q. Did you know his brother, Bill Ray?
- A. I believe I remember meeting Bill Ray. Johnny Ray is the one I knew.
- Q. Of course, you knew the office staff, did you not, Mrs. Higgins? A. Yes.
 - Q. And you knew Mr. Easton? A. Yes.
 - Q. And you knew Mr. Hoover, did you not?
 - A. That is right.
- Q. With reference to the suppliers, you have testified that you had certain types of contact with them. Could you [231] please explore that a little further and tell us what other dealings, aside from discussing additional time, you had with them?
- A. The particular occasion I had in mind was the one, if I recall correctly, just ahead of June 8th, of the payment for the concrete bill for the month of May. My recollection, if it serves me correctly, it was due on June 10th and it was apparent that there would be no money with which to pay it; that it would be far and away an insufficient fund with which to meet the concrete bill of some \$62,000. They were threatening, the Nelslo Company were threatening, to cut off any further material unless they were paid this substantial sum by June 10th.

I so notified—in other words, that threat was made to me on the phone; I am trying to answer your question—I so notified my people by long distance and received their authorization to pay it so long as it was approved by White-Ahlgren, and I

(Testimony of Burton A. Van Tassel.) obtained from them a letter certifying that the material had been used on the job, that they had insufficient funds with which to pay it, and request-

Q. Did you dictate that letter, sir?

ing Century as its surety to pay it.

A. I wrote it in longhand, as I recall.

Mr. Sherman: May we have this marked Defendant's Exhibit next in order, please? [232]

The Clerk: AB.

(The document referred to was marked as Defendant's Exhibit AB for identification.)

The Court: That is a letter of what date? Mr. Sherman: June 10, 1954.

Q. Mr. Van Tassel, I now hand you that which has been marked Defendant's Exhibit AB for identification, being a copy of a letter dated June 10, 1954, addressed to The Century Indemnity Company by the White-Ahlgren Company, Inc.

I ask you, sir, if that is a copy of the letter you testified about?

The Court: You mean, is that the letter he just testified about having written by hand? He just said that he wrote a letter by hand.

Mr. Sherman: All right. Let me rephrase it this way, your Honor:

- Q. Is this a typed copy containing the same contents as the letter written by you in hand?
 - A. That is right.
 - Q. Was the letter written by you in hand signed

(Testimony of Burton A. Van Tassel.)
by the White-Ahlgren people or was it retyped and signed?

A. I am certain that it was signed. To the best of my recollection it was signed at the time.

Mr. Sherman: Offer it in evidence as Defendant's Exhibit AB, your Honor. [233]

The Court: Admitted.

(The document referred to was marked as Defendant's Exhibit AB, and received in evidence.)

- Q. (By Mr. Sherman): Now, Mr. Van Tassel, in your dealings with White-Ahlgren and Marine Development on this job, did you ever have any dealings with a party by the name of Stewart concerning trucks and equipment used on the Camp Pendleton job that had been attached?
- A. I had no dealings with Stewart. There is a Stewart, as I recall, who was the nominal plaintiff in an action against White-Ahlgren in which his trucks were attached.
- Q. Did you do anything in connection with the attachment?
- A. Yes, I talked to Attorney Adele Walsh or Welsh—I have forgotten which—Pines and Walsh, with regard to lifting that attachment, could some arrangement be made so that the trucks which had been attached, a portion of them, could be put back on the job and utilized.
 - Q. As a result of those discussions was a written

(Testimony of Burton A. Van Tassel.) agreement effected between White-Ahlgren and the attaching party?

A. I think Mrs. Walsh prepared a confession of judgment with regard to it.

Mr. Sherman: May we have this marked as Defendant's next [234] in order, please?

The Clerk: Defendant's Exhibit AC.

(The document referred to was marked as Defendant's Exhibit AC for identification.)

The Court: What is this?

Mr. Sherman: This is an agreement, your Honor, pertaining to this matter which I would like the witness to testify about.

The Court: Let me identify it in my notes first.

(The exhibit referred to was passed to the Court.)

- Q. (By Mr. Sherman): You have before you, Mr. Van Tassel, a copy of what appears to be an agreement pertaining to an action in the Superior Court of the State of California, in and for the County of Los Angeles, further pertaining to an attachment and release of attachment. Do you recognize that document, sir?
- A. I recognize my handwriting on the first page in the upper corner.

As I read it over, it looks as though it was a part of the understanding at the time.

Q. In connection with the execution of this

(Testimony of Burton A. Van Tassel.)
agreement, did you represent White-Ahlgren in that
matter?
A. I did.

Q. As a result of the execution of this agreement some [235] of the attached equipment was released and allowed to continue on the job?

A. Yes, sir.

Mr. Sherman: Offer it into evidence as Defendant's Exhibit AC, your Honor.

The Court: The agreement was executed, was it?

Mr. Sherman: I believe it shows that.

The Witness: I have conformed the copy there, your Honor. That appears to be my copy.

The Court: Very well. It is admitted.

(The document referred to was marked as Defendant's Exhibit AC, and received in evidence.)

Mr. Sherman: May I have Plaintiff's Exhibit 27 in evidence, Mr. Clerk?

(The exhibit referred to was passed to Counsel.)

Q. (By Mr. Sherman): As best you can now recollect, Mr. Van Tassel, when was that agreement executed?

A. I didn't examine the date, Mr. Sherman. It was some time in May or June, I presume, of 1954. I presume the date appears on the document.

Q. No; it does not; that is why I asked you.

The Court: There is no date? [236]

Mr. Sherman: The date does not appear.

The Court: It doesn't even show a date of the lawsuit.

The Witness: It shows a month, does it not, on the first page?

Mr. Sherman: No, it doesn't. It is blank as to the date except for the year 1954.

The Court: This blank day of blank.

Mr. Sherman: That is why I was trying for the record to fix the approximate time.

The Witness: I see. I would guess it was somewhere around May or June of that year.

Q. (By Mr. Sherman): Now, sir, I hand you Plaintiff's Exhibit 27 in evidence—

Mr. Burford: I was wondering about Exhibit 27, if that has been admitted?

Mr. Sherman: I believe so.

The Court: I do not remember. Let me see it.

(The exhibit referred to was passed to the Court.)

The Court: No; it is only marked for identification.

Mr. Sherman: I am sorry.

The Court: You can still examine him on it.

Mr. Sherman: Yes, I can, but I thought it had been offered and admitted, your Honor. [237]

Q. Mr. Van Tassel, Plaintiff's Exhibit 27 for identification, do you recognize that document?

A. I do.

Q. Is that an assignment of the rights made to Century Indemnity by the White-Ahlgren Com-

pany? A. It so states, yes.

The Court: What is the date of it?

The Witness: The 28th day of May, 1954.

Q. (By Mr. Sherman): Do you know who drew up this assignment? A. Yes; I did.

Mr. Sherman: Offer it into evidence, your Honor, as Defendant's Exhibit marked Plaintiff's 27.

The Court: It may be admitted.

(The document referred to was marked as Plaintiff's Exhibit No. 27, and received in evidence.)

Q. (By Mr. Sherman): Now in connection with that, Mr. Van Tassel, did you have anything to do with the filing by White-Ahlgren of a mechanics' lien against the Crevette Construction Company?

A. I did.

Q. Please tell us what you did in that regard.

A. I requested the information as to what work had been performed by White-Ahlgren on the four different units of the [238] Claremont Gardens tract, separate mechanics' liens were then written up and executed by Mr. Ahlgren, as I recall.

Q. Was this Crevette Construction Company job also commonly known as the Webb & Knapp job?

A. That is correct.

The Court: This Exhibit 27 is an assignment which relates to that Crevette job, or whatever it is?

Mr. Sherman: Yes.

The Court: It does not relate to any sums due in the job on the Base?

Mr. Sherman: That is correct, your Honor.

The Court: Very well.

- Q. (By Mr. Sherman): In connection with that Crevette job you actually did such work as was necessary to accomplish the filing of mechanics' liens? A. Yes.
- Q. Now, Mr. Van Tassel, with respect to the presentation to you on April 30th of this check and return for payment of Federal taxes—

The Court: Is that in evidence?

Mr. Sherman: No; I believe the witness testified, your Honor, that on April 30th——

The Court: I know, but I wondered if that return or a photostatic copy was in evidence. [239] Mr. Sherman: No; they are not in evidence, your Honor.

- Q. I believe you testified in that regard, did you not, that the only reason it wasn't paid at that time was that there were insufficient funds in trust account to pay it in full?
- A. I testified that that was one of the reasons why I did not sign the check.

The Court: Did you testify it was the only reason?

The Witness: Well, I think I perhaps did.

The Court: And it was the only reason?

The Witness: That was the only reason at that time, yes.

Q. (By Mr. Sherman): Is it not true, sir, that

(Testimony of Burton A. Van Tassel.)
during this same month of April payrolls were
being made, were they not?

A. Certainly.

- Q. Suppliers were being paid, were they not?
- A. In part, yes; not in full.
- Q. Well, taking that month of April, would it be correct to state that approximately \$50,000 was paid to suppliers in that money alone?
- A. Mr. Sherman, I do not have the records before me. I can't answer your question.
 - Q. Does that figure sound out of line to you?
 - A. I wouldn't attempt to appraise it.
- Q. Now, after April 30th, did you ever okay a check for [240] payment of those taxes?
 - A. I did not.
 - Q. Did you ever transfer—

The Court: Was it ever present to you by White-Ahlgren or any of their employees?

The Witness: I don't recall any subsequent presentation of any payroll tax checks, your Honor. I recall that they were discussed, but the same situation prevailed. Whether subsequent payroll tax checks were prepared or not, I don't presently recall.

- Q. (By Mr. Sherman): Irrespective of whether or not a check was put in front of you, were you requested at any subsequent time to authorize the issuance of a check against the trust account for payment of taxes?
 - A. I don't recall, Mr. Sherman. I may have.
 - Q. But, in fact, you know you did not actually?

A. I know I did not countersign any checks for payroll taxes.

Q. For that period or any subsequent period?

A. That is correct.

The Court: Did White-Ahlgren have another bank account at that time?

The Witness: They had had, your Honor, in the early stages a general account known as White-Ahlgren Company, Inc. [241] Whether there were any funds remaining in it at that time, I do not know.

Mr. Sherman: Your Honor, in that regard I believe Defendant's Exhibit E is the bank ledger of that account showing the status of it throughout this period.

Q. Now, Mr. Van Tassel, did you ever seek to set aside from the trust fund any of the payroll taxes as a separate fund?

A. No.

The Court: When you say that that was the only reason why this wasn't paid, you mean by that to express that in your opinion those taxes were due and payable out of that account, the payroll account, and not otherwise payable by White-Ahlgren?

The Witness: Your Honor's question isn't clear to me.

The Court: You said the only reason this check was not paid was because there wasn't sufficient money in the payroll account, the trustee account.

The Witness: In the trustee account.

The Court: And by that statement, do you mean

to give it as your opinion that that is the only account from which those taxes could have been collected, or could they have been collected from other assets and property of White-Ahlgren?

The Witness: They might have been collected in part at least, I would guess, from other assets of White-Ahlgren. I hadn't any knowledge as to that at that time. My knowledge of [242] the situation was restricted to what the trustee account itself revealed as to a checkbook or a bank balance.

This was all in the early stages, if your Honor please, when I was getting my feet wet on the job.

The Court: I understand. The implication of your answer is that the only reason it wasn't paid is that there wasn't any money and that that account owed the money, and if you had control of the account you owed the money, if that is what you mean to say.

The Witness: That is what I mean to say, that there was insufficient money in that account with which to meet those payroll taxes at that time and I therefore declined to countersign a check.

The Court: And that is the only reason the tax was not paid?

The Witness: Yes.

The Court: It looks to me like that is about the end of your lawsuit, Counsel.

Mr. Burford: I don't think so, your Honor.

The Court: I mean, if that is the only reason the tax wasn't paid then the tax was due out of that account.

- Q. (By Mr. Sherman): Mr. Van Tassel, after this April 30th discussion with Mrs. Higgins, you did continue to pay payroll, did you not, out of the trust account? [243]

 A. We did.
- Q. And you did continue to pay suppliers out of the trust account, did you not?
 - A. That is right.
- Q. At any time after April 30th was there sufficient balance in the trust account to meet any of the Federal taxes then due?
 - A. After April 30th?
 - Q. Yes. A. Not payroll.
 - Q. It was always less than \$11,000?

Mr. Burford: I object to that, your Honor.

The Court: Do you know?

Mr. Sherman: The witness has made a statement, as I understand the witness' testimony, that as far as he knows it was never sufficient.

The Court: Did you see the bank statements on that account?

The Witness: Did I see the bank statements?

The Court: Yes.

The Witness: I did not see the bank statements.

The Court: How do you know what they had in the account then?

The Witness: We had a running record which I kept, along with Mrs. Higgins, the bookkeeper. Every week when I went down [244] there, your Honor, we would keep a rather running record showing what the balance was the previous week, how much we were depositing into the account,

what the payment amounted to, what amount of material bills were paid, and we arrived again at the end of each week at a very low balance, a matter of \$2,000 or \$3,000.

The Court: Look at the trust account before you testify—you better look at it—it shows balances of \$14,000, \$15,000.

The Witness: (Examining exhibit.)

The Court: Unless you are just trying to find out whether or not he knew whether or not there was sufficient funds whether or not he knew what the balances were.

Mr. Sherman: No; I am trying to establish whether or not at any time when other bills were being paid that he knew there was sufficient money there so that this could have been paid in lieu of those other bills.

Mr. Burford: It seems to me, your Honor, that the bank account speaks for itself.

The Witness: The question, your Honor clarified for me, and as far as that is concerned I am not paying any attention to these earlier sheets because I was not in the picture at that time, and as of April 30th your Honor will note that there is a bank balance, according to this of \$4,071. Then we put in \$14,000 here—it is recorded there as May 1st but as soon [245] as all these many payroll checks are drawn against it, it reduces very quickly to a relatively small balance—but the matter of meeting, if there were such funds on hand so that the material bills and the payroll could have been

met, we then would, had there been that excess, have gone ahead and paid the payroll taxes. But we were meeting the payrolls which had to come first and the material bills had to come second.

- Q. (By Mr. Sherman): And the payroll taxes third?

 A. That is right.
- Q. Now, at the time of this April 30th discussion, when there was, as you testified, insufficient funds to meet it in full, were there any funds to meet any part of it?
- A. It is my recollection that there were funds of approximately \$3,000. It may have been between \$3,000 and \$4,000.
- Q. Did you indicate or suggest that you would authorize a check for that amount or some lesser amount?

 A. I did not.
- Q. As a matter of fact, sir, didn't you indicate that you wouldn't approve any check unless there was sufficient funds to meet it all?

A. I don't recall that.

Mr. Sherman: Mr. Clerk, may I have Defendant's Exhibits D, F and G—pardon me, make that F, H and J. [246]

(The exhibits referred to were passed to Counsel.)

The Witness: Your Honor, may I supplement my last answer?

The Court: Yes.

The Witness: If Mr. Sherman is purporting to cover the matter of sufficient funds on hand with

which to pay the payroll taxes at any given time, the bank statements would indicate enough of a balance on occasion in the account with which to pay the payroll taxes, but it was necessary, as far as White-Ahlgren was concerned, to go ahead and meet the payrolls and you had to build up a balance with which to do that and to meet the material bills as far as you could go, and you had to build up a balance to do that.

- Q. (By Mr. Sherman): Would this be a fair statement, sir, if there was sufficient funds to meet it all you would have authorized it all, but there not being sufficient funds, and you having to pick and choose your order of priority was payroll first, suppliers second, would that be a fair statement?
 - A. Yes.
 - Q. Now, Mr. Van Tassel, I show you-

The Court: Did White-Ahlgren or anybody ever say how they were going to pay these payroll taxes or other taxes? Did you have any discussion with them about that? [247]

The Witness: When I was first in the picture there was this matter of garage slabs talked about as a possible \$50,000 recovery. There was also the purported balance which was due from Webb & Knapp on the Claremont Gardens job.

So that in connection with each of these there appeared to be sufficient money.

The Court: Did you have a discussion with them about that?

The Witness: Oh, yes, I did.

The Court: What did they say, that that is where they were going to get the money to pay the payroll taxes, and so forth?

The Witness: They weren't talking so much about the matter of payroll taxes right then as the matter of future possible recoveries.

The Court: All right.

- Q. (By Mr. Sherman): In that regard, Mr. Van Tassel, with reference to the possibility of the Webb & Knapp payments, all of White-Ahlgren's rights to the Webb & Knapp payments were assigned to Century Indemnity as of May 28, 1954, is that not correct? A. That is right.
- Q. With respect to the \$50,000 additional funds on the garage slabs, at no time to your personal knowledge did Marine Development ever promise they would make such a payment, is that [248] not correct?
- A. They didn't promise they would make any such payment. They said they would consider it again.
 - Q. Finish the job and we will see you then?
 - A. Yes.
- Q. So you knew they had never indicated that they would?
 - A. I haven't testified at any time they did.
- Q. I now show you Defendant's Exhibit F for identification, Mr. Van Tassel. Do you recognize that document? A. I do.
- Q. That is an agreement of release and indemnity whereby Century Indemnity Company agrees

to indemnify the Marine Development Company against any claim of the United States, of the State of California, or of a garnishee named Ocean House, Inc., and another possible claimant to the 10% retention monies in consideration of Marine Development transferring those funds to Century Indemnity Company.

A. That is what the agreement says, yes.

The Court: That indemnifies Marine Development?

Mr. Sherman: That indemnifies Marine Development against any——

The Court: Liability on taxes involved in this case?

Mr. Sherman: Yes, if they turn certain monies that Marine Development held over to Century Indemnity Company.

The Witness: Pardon me, your Honor. Mr. Sherman's answer [249] is rather all-inclusive.

The only claim for taxes which was involved is Item No. 1 there in the sum of \$12,000-odd.

The Court: Payroll taxes?

The Witness: Payroll taxes.

Mr. Burford: That is for the fourth quarter of 1953 only, your Honor, not for the taxes here in issue, in total.

Mr. Sherman: I think the stipulation between the parties shows this, your Honor, that prior to the execution of this agreement Marine Development was served with a levy by the Internal Rev-

enue Service and the levy was in the amount of \$12,718.11.

The Court: Those taxes are not involved in this case?

Mr. Sherman: They are involved.

Mr. Burford: They are, but this is only a part of them.

Mr. Sherman: This is a part of the whole.

The Court: Yes. In other words, these are the payroll taxes.

Mr. Sherman: Yes.

The Court: You also have withholding taxes.

Mr. Burford: For one quarter.

You see, the fourth quarter of 1953 and the first three quarters of 1954 are involved, and the only point we are making was that when you say these are the taxes issued therein, they are some of [250] them.

The Court: It is a part of the taxes?

Mr. Sherman: It is a part of the taxes.

The Court: All right.

Q. (By Mr. Sherman): This agreement, Mr. Van Tassel, was executed by you as attorney and agent in fact of The Century Indemnity Company?

A. That is how it was specified there. It was executed by me.

Q. You received specific telegraphic authority from The Century Indemnity Company to so execute it, did you not?

A. I did.

Mr. Sherman: Offer it into evidence, as Defendant's Exhibit F, your Honor.

The Court: It is admitted.

(The document referred to was marked as Defendant's Exhibit F, and received in evidence.)

The Court: What is meant by payroll taxes?

Mr. Sherman: I think it is a broad term, your Honor, which includes the withholding of the employee, his share and the employer's share of the Social Security taxes, and also the unemployment tax.

Mr. Stacey, do you have Exhibit H?

The Clerk: I gave it to you already. [251]

- Q. (By Mr. Sherman): Mr. Van Tassel, I now hand you that which has been marked Defendant's Exhibit H for identification, which purports to be Check No. 2468, made by the Marine Development, Inc., company payable to The Century Indemnity Company in the amount of \$54,249.18. Did you receive that check pursuant to the execution of this agreement of release and indemnity, Defendant's Exhibit F?

 A. I did.
 - Q. What did you do with that check?
- A. I sent that through to The Century Indemnity Company at Hartford, Connecticut.

The Court: That is Exhibit what?

The Witness: That is Exhibit H, your Honor.

Mr. Sherman: I offer it into evidence as Defendant's Exhibit H, your Honor.

The Court: It is admitted.

(The document referred to was marked as Defendant's Exhibit H, and received in evidence.)

- Q. (By Mr. Sherman): And that represented the final 10% retention monies that Marine Development had at the time?

 A. Yes.
- Q. By this time, of course, sir, Century Indemnity had [252] expended out of its own funds monies in payment of suppliers on the Camp Pendleton job?

 A. For materials, yes.
- Q. In addition to indemnifying Marine Development Company with respect to any liability they might suffer if they surrendered this check to you, did you also indemnify Marine Development—and by "you," I mean Century Indemnity—did you also indemnify Marine Development against any tax claims of the State of California, if they continued to make wage payments on the job?

Mr. Burford: Are you referring to this——
The Court: Exhibit F?

Mr. Sherman: I am not, sir. Let me rephrase the question.

Q. In addition to the indemnifications contained in Exhibit F, did you on behalf of Century Indemnity execute any documents wherein you agreed on their behalf, or Century Indemnity agreed, to indemnify Marine Development Company against any tax claims of the State of California if Marine Development continued to deposit the progress payments into the trust account rather than divert any

(Testimony of Burton A. Van Tassel.)
of those payments to paying State of California
taxes?

- A. We indemnified them to a limited extent, Mr. Sherman. Your question is too broad.
- Q. You did indemnify them to some extent, then? [253]

The Court: When, before or after the job was finished?

The Witness: Before the job was finished.

The Court: Before the job was finished?

The Witness: Yes.

The Court: We will recess until 2:00 o'clock.

Mr. Sherman: Before we do that, may I just put this in?

- Q. Mr. Van Tassel, I show you Defendant's Exhibit G for identification. Is that the letter of indemnification that you are speaking about with reference to the State of California?
 - A. That is right. [254]

* * *

Redirect Examination

By Mr. Burford:

Q. Mr. Van Tassel, this morning you testified, I believe, on direct examination or cross-examination, or both, that you as the trustee for Century would have countersigned a check for the payroll taxes, that would be the amount due from the employer for Federal income tax withheld, Social Security taxes and Federal unemployment tax, had

there been enough money in the bank account to make this payment. Would you explain to Judge Hall what you meant by that statement?

- A. I will repeat, that what I had in mind was that if there was sufficient money to meet the payrolls and the material bills with an excess over and above that, that then we would have paid the payroll taxes. [258]
 - Q. In other words, I believe——

Mr. Sherman: Your Honor, I will object to Counsel's redirect. This is a critical issue in the case, the witness is an attorney, this is redirect examination, and I do not think it is proper under all circumstances for counsel to lead this witness to get the answer counsel wishes.

I think if he has pertinent questions on redirect he should ask them without stating to the witness what answers he desires and merely expect a yes or no answer.

The Court: He hasn't, but he was giving an indication that he was about to by his use of "in other words."

Mr. Sherman: Yes, your Honor.

Mr. Burford: I will withdraw the question, your Honor.

- Q. Mr. Van Tassel, what were the lienable claims under the bond of Century Indemnity?
- A. They were claims for materials which were furnished to and used in the job.
- Q. Were there other lienable claims under the bond?

A. Labor would have been a lienable claim, yes.

Mr. Burford: At this time, your Honor, I offer in evidence Plaintiff's Exhibit 20 for identification, which is a schedule of payment made by Century Indemnity to creditors of White-Ahlgren.

The Court: Very well.

The Clerk: Plaintiff's Exhibit No. 20. [259]

(The document referred to was marked as Plaintiff's Exhibit No. 20 and received in evidence.)

Mr. Burford: The total amount is in the stipulated facts. This just gives a breakdown.

Q. Mr. Van Tassel, I direct your attention to Plaintiff's Exhibit 20——

The Court: That is payment by Century Indemnity Company?

Mr. Burford: That is correct, your Honor.

- Q. —that shows a payment on June 10, 1954, to Nelslo Corporation of \$62,143.72?
 - A. That is right.
 - Q. What was that payment for, Mr. Van Tassel?
- A. That covered the May deliveries of mixed concrete to the job.
- Q. How did Nelslo render its billing forms for mixed concrete?
- A. I saw billings which were in the construction shack of White-Ahlgren Company which I understand had been delivered to Mrs. Higgins by the foreman on the job, one of the foremen on the job,

(Testimony of Burton A. Van Tassel.) these being delivery slips as each truckload of mixed concrete came in and dumped its load.

Thereafter the billing would be made up, as I recall, from the accumulation of these delivery tickets indicating quantities. [260]

- Q. Which were payable how often, did you say?
- A. They were payable on the 10th of the month following the month in which the deliveries were made.
- Q. Now, Mr. Van Tassel, Judge Hall asked you before recess at noon what sort of record you kept of what was in the White-Ahlgren Trust Account No. 1. Would you explain for his benefit what sort of record you maintained as to the status of that account?
- A. Yes. I continued the practice by Mrs. Cole of a running record of checks drawn against the Trust Account No. 1 with this explanation necessary, that when it came to the matter of payroll I would show that as payroll ending such and such a week in the lump sum, or the total of the net wages, rather than listing each individual employee's name and amount.

But other than that, we kept a running record, payroll, for example, \$10,789 and odd cents, and then a separate listing of each individual check which we drew for materials.

The Court: Where did you get the information, from White-Ahlgren's bookkeeper?

The Witness: From White-Ahlgren's book-keeper.

The Court: Did you have access to their bank statements?

The Witness: I wasn't checking their bank statement.

The Court: No. No. Did you have access to them?

The Witness: I had access to their [261] checkbook.

The Court: But did you have access to the bank statements which have been introduced here in evidence?

The Witness: I didn't make it a practice of doing so.

The Court: Did you ever go to the bank to check up to see what their balance was, or whether or not they had the money in the bank that they said they had?

The Witness: No.

The Court: Did they show you a bank statement?

The Witness: I don't recall that they ever showed me a bank statement. Mrs. Higgins and I would try to reconcile our records with respect to the running balance.

The Court: In the checkbook?

The Witness: In the checkbook, and she would confirm to me what the amounts were, if we had any differences, in other words.

On one occasion we did have. I corrected it in my running record. But she knew what the total of the payroll checks were, she knew what each (Testimony of Burton A. Van Tassel.)
material bill that was paid was, and she kept a
running record of it.

The Court: Did you ever deposit any money in the account, whatever the name of this account is?

Mr. Burford: Trust Account No. 1.

The Court: Trust Account No. 1.

The Witness: I accompanied Mr. White——

The Court: No; did you ever go down and make a deposit? [262]

The Witness: I went with him, yes, to the bank, to the Carlsbad branch.

The Court: When they put their money in?

The Witness: When they put the trust account check in, the Marine Development Company's check payable to White-Ahlgren Trust Account No. 1.

The Court: Did you put it in?

The Witness: They would go to the window.

The Court: Who was it payable to?

The Witness: It was payable to White-Ahlgren Trust Account No. 1.

The Court: Did you endorse it?

The Witness: I don't recall that I did. I may have. But I don't recall that that was required. I mean, it was simply for deposit only, White-Ahlgren Trust Account No. 1, by so and so.

Mr. Burford: I think, your Honor, the stipulation of facts is that all of the progress payments made under this contract were deposited to the account of White-Ahlgren in the Trust Account No. 1.

The Court: I understand that stipulation of facts, but the government is contending here that

he on behalf of The Century Indemnity Company was, in truth and in fact, the contractor. That is what they are trying to establish.

Mr. Sherman: The frame of reference is that I think [263] plaintiff has to establish that they were not by their conduct the employer and, second—

The Court: Your position then, let us say——

Mr. Sherman: Our position is that the evidence will fail to show that plaintiff was not in control, realistically speaking, of the running of this job and, most important as bearing upon the running of this job, the financial control whereby the company could run the job.

That is our position and our contention.

The Court: I am stating it a little more bluntly than you are. The net essence of your contention is that Century Indemnity was, in truth and in fact, running the business.

Mr. Sherman: Was in control of it. We think that word "control" is the important thing under the Ninth Circuit decisions, your Honor.

The Court: In any event, that was the purpose of my question. It isn't a question of the stipulation; the question is whether or not he for Century Indemnity got the money from Marine Development, took it and deposited it in the account.

Did you ever do that?

The Witness: I have no recollection of doing that. I may have. I certainly went with them.

Your Honor objected to my stating what I did. On each occasion we wanted to be certain that the

money went into the bank. None of us wanted to be countersigning checks [264] against an account which would not have the money in it.

The Court: Did you go with them on every check that they deposited, or do you know?

The Witness: I think that I accompanied them in most of the instances when I was down there, yes.

The Court: Just when you were there?

The Witness: Pardon me?

The Court: Did you ever see the bank statements until this morning?

The Witness: Yes; I had seen copies of them before.

The Court: Did you ever notice the deposits made on there?

The Witness: No. I mean, I did not check them. We had an accountant go over this, your Honor.

The Court: I understand.

The Witness: I wasn't attempting to verify his work.

The Court: All I am trying to find out is whether or not you were the boss man.

Mr. Burford: Your Honor, I don't want there to be any doubt in your mind. I would like to clarify the facts for your Honor in this respect, if I may.

Q. Mr. Van Tassel, you stated that you went down to—

Mr. Sherman: Your Honor, I dislike to interrupt——

The Court: He has a right to refer his question

(Testimony of Burton A. Van Tassel.) on direct examination. He hasn't come to his question yet. [265]

Mr. Sherman: I thought Counsel was making a statement at this point.

Mr. Burford: I will phrase it this way:

- Q. When did you go to Camp Pendleton normally?

 A. On Friday of each week.
- Q. When did Marine Development make progress payments to White-Ahlgren?
 - A. On Friday of each week.
 - Q. What was the basis for these payments?
- A. The amount of work which had been done during the past week up until I think Wednesday of the week on which the Friday followed.
- Q. Do you know how those statements were prepared?
- A. You are talking about the statement to Marine Development?
 - Q. The statement to Marine Development.
- A. They were prepared, I understand, by Mrs. Higgins ordinarily based upon computations by Mr. White and Mr. Ahlgren perhaps, and Mr. Ray perhaps, of the work done during the past week for which they might render a bill, and those estimates then, if we may call them that, were then submitted to Marine Development Company for checking by them.

On occasion they might decide in their check on the amount of work done that it was somewhat overstated and cut down the amount they were willing to pay on that given Friday. [266]

- Q. Those statements were the ones on which the bills were rendered and the progress payments were made?

 A. That is right.
- Q. Did you ever see those statements or any of them when you were down there on Friday?
- A. Yes; on occasion I was furnished with a copy by Mrs. Higgins.
 - Q. Where was that?
- A. That would be in the White-Ahlgren Company construction shack.
- Q. Then after these statements had been rendered and approved, what was done with them?
- A. They would have been furnished Marine Development, a copy or perhaps the original of that statement, which was checked over by it, and either approved or slightly modified downward, as the case might be, and we would then—"we" meaning Mr. White, Mr. Ahlgren and I—ordinarily would go over to the headquarters building of Marine Development, usually in the mid-afternoon, and meet with them, at which time they would draw a check for the amount they were willing to pay for that past week's work.
- Q. Where was this bank account in which the check was deposited, that is, the White-Ahlgren Trust Account No. 1?
- A. That was in the Security Trust & Savings Bank and they were deposited in their branch bank in Carlsbad. [267]
- Q. For that account in the main office in San Diego? A. That is correct.

Mr. Burford: I just wanted to clear up the mechanics of how this was actually handled.

The Court: Very well.

Now on this Exhibit 20, this is a list of payments made by Century Indemnity, where they paid from this Trust Account No. 1?

The Witness: Oh, no.

The Court: These were paid by Century Indemnity checks?

The Witness: That is correct.

The Court: Very well.

Q. (By Mr. Burford): Now, Mr. Van Tassel, I call your attention to Defendant's Exhibit D, which is a transcript of the White-Ahlgren Trust Account No. 1 bank account.

Will you look at that bank statement and state what it shows to be the bank balance as of April 30, 1954.

- A. It shows a balance of \$4,071.18.
- Q. Now going on down this statement, Mr. Van Tassel, you will see deposits and withdrawals and balances from time to time.

Will you explain to the Court how you determined how much money you needed in the bank to meet material bills and labor payroll? [268]

The Court: I understood he did not see these.

Did you use the bank statement in that connection at all, or did you rely upon the statement prepared by this bookkeeper and their checkbook?

The Witness: I relied on the checkbook, as far as that is concerned.

The Court: On the checkbook?

The Witness: Yes.

Mr. Burford: Well, your Honor, the balance in the bank would not correspond exactly with the balance as shown on the books because, of course, there would be checks outstanding.

The Court: I do not suppose it would.

Mr. Burford: Perhaps we should introduce the books. The purpose of this testimony was not to show exactly the balance at what time. May we wait until the books are introduced?

The Court: What is the purpose of the books? Mr. Burford: The purpose of it, your Honor, was directed to the proposition this morning that at a particular time there would be a balance in the bank account, which, of course, there was, and my purpose is to show how the balance went up and down as the payment of suppliers and material bills came in which they knew would be due.

Mr. Sherman: Perhaps we can save the trouble. I will stipulate, your Honor, that the balance fluctuated with the [269] payment of payroll and material, if that is what Counsel is interested in. There is no question about that.

The Court: I do not think there is any need of encumbering the record here with the books and records of the company. The question involved here in this case is not so much the status of the White-Ahlgren Company as it is what this plaintiff had to do with it, and he has testified to that, and I think

(Testimony of Burton A. Van Tassel.) that would be sufficient without introducing the books.

I inquired of that because I wanted to know whether or not he ever used this bank statement, and he has testified that he did not, that he and the bookkeeper used the checkbook to check against the checks and withdrawals.

Mr. Burford: I believe, your Honor, unless you have any further questions, that is all I have.

The Court: I do not have any questions.

Mr. Sherman: Your Honor, a few points were brought out on redirect that I would like to go into.

The Court: Very well.

Incidentally, in going through the bank statements I notice that practically all bank deposits were credited on Monday.

Mr. Burford: Possibly deposited Friday and it would show up as a Monday credit.

The Witness: It is a branch bank. [270]

Recross-Examination

By Mr. Sherman:

Q. Mr. Van Tassel, after you became an authorized trustee on this bank account, do you know to whom the bank statements were mailed by the bank?

A. I do not.

The Court: Were they mailed to you?

The Witness: They were not mailed to me.

Mr. Sherman: May we have these marked Defendant's Exhibit next in order, please?

The Clerk: AD.

The Court: Are they a group, a series?

Mr. Sherman: Just two each. I believe they should be separately marked, your Honor.

The Court: That will be AD and AE.

(The documents referred to were marked as Defendants' Exhibits AD and AE, respectively, for identification.)

Q. (By Mr. Sherman): Mr. Van Tassel, I now hand you that which has been marked Defendant's Exhibit AD for identification, being a check made by Marine Development, Inc., payable to the White-Ahlgren Trust Account No. 1 under date of July 23, 1954, in the amount of \$58,019.76.

Will you examine that check, sir, and will you please [271] examine the endorsement on the reverse side thereof?

A. I have.

- Q. Would you please read that endorsement, sir?
- A. "For deposit only, White-Ahlgren Trust Account No. 1, by Burton A. Van Tassel, Trustee."
 - Q. Is that your handwriting, sir?
 - A. It is.
- Q. You then deposited this check in the trust account? A. I endorsed it.

Mr. Sherman: Offer it in evidence, your Honor. The Court: Admitted.

(The document referred to was marked as Defendant's Exhibit AD and received in evidence.)

Q. (By Mr. Sherman): Mr. Van Tassel, I now hand you that which has been marked Defendant's Exhibit AE for identification, being another check made by Marine Development, Inc., payable to White-Ahlgren Trust Account No. 1, under date of September 3, 1954, in the amount of \$558.18. Will you please examine the endorsement on that check?

A. I have.

Q. Is that endorsement also yours?

A. It is.

Mr. Sherman: I offer it in evidence as the Defendant's [272] Exhibit next in order.

The Court: It will be received.

(The document referred to was received as Defendant's Exhibit AE in evidence.)

The Court: Do you recall the circumstance of getting either one of these checks?

The Witness: I don't recall, your Honor.

Q. (By Mr. Sherman): Mr. Van Tassel, at any time while you acted as trustee of the White-Ahlgren Trust Account No. 1 was your authority and approval a condition precedent to the issuance of Marine Development Company of any of its progress payments to the trust account?

The Court: Or to White-Ahlgren?

Mr. Sherman: No-well, your Honor, I believe

that with one or two exceptions all checks were made payable directly to the trust account.

The Court: All right.

Mr. Sherman: And the one or two exceptions were deposited in the trust account. This is by stipulation of the parties.

The Court: Very well.

The Witness: I recall that it was common practice for the Marine Development Company to require a letter of consent executed by the person representing the Century as trustee, that being unquestionably due to the change in progress [273] payments, they didn't want their bond exonerated, didn't want the surety company exonerated because the progress payments were changed.

The Court: A letter of consent to what?

The Witness: To the Marine Development Company consenting to the payment of the particular amount on each given week. Their normal payments would have been monthly.

Q. (By Mr. Sherman): As a matter of fact, they would not issue their checks for the weekly payments until such a consent had been furnished to them, is that not correct?

A. We didn't try. They always requested it and we furnished it.

Q. Did they lead you to believe that they would require it before they would do it?

A. I think that would be a fair statement.

Mr. Sherman: No further questions, your [274] Honor.

MRS. TRENE HIGGINS

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: Mrs. Irene Higgins.

The Clerk: Will you spell your last name?

The Witness: H-i-g-g-i-n-s.

The Clerk: Your address, please.

The Witness: 11331 Culver Drive in Culver City. [328]

Direct Examination

By Mr. Sherman:

- Q. Mrs. Higgins, you were the bookkeeper for the White-Ahlgren Company, were you not?
 - A. Yes, sir; I was.

The Court: For what period?

The Witness: For the period from March of 1953 until August of 1954.

- Q. (By Mr. Sherman): I take it then you were the bookkeeper for the company at the time that the Camp Pendleton job commenced?
 - A. Yes, sir; I was.
- Q. At the time of the commencement of that job did you prepare weekly payroll sheets with respect to the payroll on that job?
 - A. Yes, sir; I did.
- Q. Will you please tell us how those payroll sheets were prepared?
- A. Yes, sir. The time cards were delivered to our San Diego office by the foremen, I would com-

pute from the time cards the hours, rate of pay, withholding tax, the other deductions, the Federal and State deductions, and arrive at a net figure. I would do that for each timecard.

At the completion of that operation I would then transfer this information to a recap sheet indicating all the [329] men's names and the various categories, the Federal taxes, the State taxes, and their net pay.

Mr. Sherman: May I have Defendant's Exhibit W?

(The exhibit referred to was passed to counsel.)

Q. (By Mr. Sherman): Mrs. Higgins, I now hand you Defendant's Exhibit X in evidence—

Mr. Burford: Pardon me, just a minute. Could you move the microphone over just a little?

The Court: You cannot hear her?

Mr. Burford: No, your Honor.

- Q. (By Mr. Sherman): Mrs. Higgins, is the Defendant's Exhibit X which you now have before you typical of the type of payroll recaps you prepared?

 A. Yes, sir; it is.
- Q. What would you do with these payroll recaps after you prepared them?
- A. These payroll recaps, the original was sent to Eva Cole's office in the very beginning, the carbon copy I kept as a file copy.
 - Q. What was your understanding as to the man-

ner in which the payroll shown on the recap was to be paid?

- A. In the beginning we were to receive an individual [330] check from Mrs. Cole for the gross payroll.
 - Q. By an individual check you mean one?
 - A. One check to cover the entire payroll.
- Q. The payroll as shown on the recap for that week?

 A. Yes.
 - Q. What was to then occur?
- A. Then we were to prepare the individual checks on a payroll account.
 - Q. Did this procedure ever change?
 - A. Yes, sir; this procedure changed.
 - Q. When did it change?
- A. On January 11th Mrs. Cole decided we should go back to net, we should adjust to net payroll rather than gross.
- Q. How was the procedure varied in accordance with that?
- A. The only change would be in the amount of the check issued by Mrs. Cole.
- Q. And the amount of the check issued would be in the amount of net as shown on the recap rather than in the amount of the gross shown on the recap? A. Yes.
 - Q. How long did that procedure continue?
 - A. Until around about the middle of March.
 - Q. What took place then?
- A. Then it was decided that a representative from the bonding company, Century Indemnity,

would come down to the [331] Pendleton construction shack and sign each individual check. No longer was one check made up for the entire payroll.

- Q. You say each individual check. Upon what account were these individual checks drawn?
 - A. On the White-Ahlgren Trust Account No. 1.
 - Q. In what amount would the checks be made?
 - A. In the net amount.
- Q. And The Century Indemnity representative would then be asked to countersign each of those checks drawn against the trust account in the net amount?

 A. Yes, sir.
 - Q. How long did that procedure continue?
 - A. For the duration.
 - Q. Until the end of the job? A. Yes.
- Q. Who was The Century representative at the beginning of this procedure? A. Mrs. Cole.
 - Q. Who were the other Century representatives?
- A. There was also Mr. Van Tassel, Monte Waite—I believe that is all.
- Q. That came down with reference to the countersigning of these checks? A. Yes.
- Q. When they would countersign these checks, would they use any source of reference to determine whether the checks [332] were proper or not?
- A. I had previously prepared this recap sheet. The representative would take the recap sheet and compare it with the checks, check by check.
- Q. Did you furnish such recap sheets to Mrs. Cole? A. Yes.
 - Q. I want to make sure, you furnished such

(Testimony of Mrs. Irene Higgins.)
recap sheets to Mrs. Cole after this procedure of signing individual checks at the job site?

- A. Yes.
- Q. Had you furnished such payroll recaps to her prior to that time under the former procedure?
 - A. Yes.
- Q. Did you at all times furnish the representative of Century Indemnity Company with a copy of the payroll recap?

 A. Yes.

The Court: Was there any other bank account of White-Ahlgren?

The Witness: White-Ahlgren had another bank account, yes, sir.

The Court: Throughout the time you were there? The Witness: No, sir. It was closed, I would say, around about March of '54.

The Court: So White-Ahlgren Trust Account No. 1 was the only bank account they had?

The Witness: After March. [333]

The Court: After Mr. Van Tassel came on?

The Witness: I think that is right.

- Q. (By Mr. Sherman): Mrs. Higgins, to clarify, there was in White-Ahlgren Trust Account No. 1 over which there was this countersignature requirement, is that correct? A. Yes.
- Q. And in addition to that White-Ahlgren had their own account as to which no countersignature was required, is that correct?
 - A. That is true.
- Q. To your knowledge, did White-Ahlgren have any other accounts which they alone controlled?

- A. No, sir.
- Q. Now with reference to the disbursements from the trust account, did you ever have the bank statements for purposes of reconciling your books with the disbursements from the trust account?
- A. At the very beginning I did not have. I did not receive December's or January's until the 1st of February. Thereafter I received them each month.
- Q. From whom did you receive them each month?
- A. I received the bank statements from the Century Indemnity office.
 - Q. At all times? [334] A. At all times.
- Q. Throughout the entire continuation of the job? A. Yes, sir.
- Q. Did you ever receive the bank statements directly from the bank?

 A. I did not.
- Q. Now, Mrs. Higgins, directing your attention to on or about April 30, 1954, did you have occasion to discuss the payment of Federal withholding and employment taxes with Mr. Van Tassel?
 - A. Yes, sir.
- Q. Would you please tell us what took place at that time?
- A. On this date, April 30th, I presented to Mr. Van Tassel a check for both the Federal and the State payroll taxes for his signature.
- Q. By "payroll taxes with reference to the Federal taxes," do you mean the withholding and the employment taxes?

 A. I do.

- Q. All right; please continue.
- A. I presented this check or, rather, two checks, one to the State and one to the Federal government, for his signature along with the reports.
 - Q. You mean the returns?
 - A. The returns, yes. [335]

Mr. Van Tassel told me at that time to mail in the returns but that we would be in a better position later on to sign these checks.

- Q. Did he at that time sign any checks?
- A. The checks were not signed.
- Q. Did he at that time indicate that if a check in a lesser amount were presented to him he would sign it?

 A. No, sir.
- Q. Did he say anything further to you at that time?

 A. Not at that time.
 - Q. What did you then do?
 - A. I mailed the returns.
 - Q. Without payment?
 - A. Without payment.
- Q. Did Mr. Van Tassel ever approve a check for payment thereafter?
- A. A check was never cancelled. It was never signed.
 - Q. During the time—

The Court: May I interrupt you a moment?

Going back to this matter of bank statements, you said you didn't receive bank statements for December or January until February?

The Witness: Yes, sir.

The Court: And then you later stated that you

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(Testimony of Mrs. Irene Higgins.)

received all statements from the office of Century Indemnity, including [336] those statements for December?

The Witness: Yes, sir.

The Court: So that you never received a bank statement of White-Ahlgren from the bank?

The Witness: That is correct.

The Court: Or cancelled checks?

The Witness: That is right. The cancelled checks go along with the statements.

The Court: In other words, all the cancelled checks and bank statements came to you from Century Indemnity?

The Witness: Yes, sir.

- Q. (By Mr. Sherman): Now, Mrs. Higgins, at the time that you had this conversation with Mr. Van Tassel and thereafter were materialmen and suppliers being paid? A. Yes, sir.
- Q. With reference to the suppliers, did you prepare any schedule or list of bills due to them?
- A. Yes; at the beginning of the month of March and thereafter at the beginning of each month I would prepare a schedule of the accounts payable.

I would segregate these vendors by Pendleton and others, I would make a separate listing.

- Q. Who told you to prepare such statements?
- A. Mrs. Cole told me to prepare the first one, which [337] would have been the first of March, for the month of February.
- Q. Did you just thereafter continue to prepare them that way?

A. Thereafter Mr. Van Tassel would ask for the schedule.

The Court: That is the schedule of what now?

The Witness: Of accounts payable.

The Court: That is besides labor?

The Witness: Yes, sir.

- Q. (By Mr. Sherman): To whom would you furnish these statements?
- A. To the representative of the Century Indemnity who happened to be at the construction shack. In most cases it was Mr. Van Tassel.
 - Q. And Mrs. Cole as well?
 - A. The very first one, I believe, yes.

Mr. Sherman: No further questions, your Honor.

* * *

Cross-Examination

By Mr. Burford:

Q. Mrs. Higgins, I just want to ask you one simple question first.

You were the bookkeeper on this job and you have stated that these individual payroll checks were in the net [338] amount due?

- A. Yes, sir.
- Q. Have you ever seen a payroll check written to an employee which wasn't in the net amount due?
 - A. No, sir.
- Q. I believe you said that this White-Ahlgren Company had another bank account, a general account, and your recollection was that it was closed

(Testimony of Mrs. Irene Higgins.) around March of 1954? A. Yes. sir.

Mr. Burford: I think that that is Defendant's Exhibit E.

(The exhibit referred to was passed to counsel.)

- Q. (By Mr. Burford): Is this the account to which you refer? A. Yes; it is.
- Q. Do you want to look at it and see when it shows?
- A. I realize now it was a smaller balance there but—I don't recall these entries.
- Q. You don't recall whether this is the entire account? A. No.
- Q. I am not trying to confuse you—it is a long time ago—I just want to ask you if you want to correct your testimony?
 - A. Now that I see it, of course.

The Court: What is your testimony? [339]

The Witness: The account shows it was closed in August.

The Court: Let me see it.

(The exhibit referred to was passed to the Court.)

The Court: Were the checks to the materialmen or for other bills incurred other than labor drawn on the trust account as well as the payroll?

The Witness: I am sorry, sir.

The Court: You drew checks for labor and then you drew checks for materialmen and suppliers?

The Witness: On this account?

The Court: No. I am going to ask which account were those checks for materialmen and suppliers drawn on?

The Witness: White-Ahlgren Trust Account.

The Court: All of them?

The Witness: Yes, sir.

The Court: Throughout your entire period with the company?

The Witness: Yes, sir.

The Court: What was their other account used for?

The Witness: During the month of December, January and February they were used for payroll from the Webb & Knapp job.

The Court: And after that?

The Witness: I don't recall.

The Court: There are several deposits here made in April, [340] \$618, \$1,700, \$1,100, and so forth. Do you remember what those were, the source of them?

The Witness: No.

The Court: Did you make them out?

The Witness: No; I wouldn't make out the deposits.

The Court: Very well.

Q. (By Mr. Burford): Mrs. Higgins, you testified that at the beginning a check was written to cover the gross amount of the payroll. That was in the beginning of the arrangement with Mrs. Cole, is that correct?

A. Yes; that is correct.

- Q. To whom was that check drawn?
- A. I never saw the checks.
- Q. Where was the check deposited?
- A. I can tell from the statements it was deposited in the White-Ahlgren general account.
- Q. That was the one that required no counter-signature of the trustee?
- A. The check drawn for the gross amount of the payroll was written on the White-Ahlgren trust account and did require a countersignature. It was deposited into the general account.
 - Q. Which did not? A. Which did not.
- Q. And that included those checks that first included [341] the withholding and Social Security and Federal unemployment tax?

 A. Yes.
 - Q. So that they did go into that account?
 - A. Yes, sir.
- Q. Reverting now to this April 30, 1954, discussion with Mr. Van Tassel about which you testified, do you know what the bank balance was on that date?

 A. I do not know.
- Q. If I showed you the books, could you refresh your recollection?
- A. I doubt very much if the books would show it. The bank statement might.
- Q. I am not asking what the bank statement showed; I am asking what the actual balance in the bank was at that date. Would the books show that?
- A. Maybe my checkbook would. I did keep a running balance in the checkbook.
 - Q. Mrs. Higgins, I show you—

Mr. Sherman: Your Honor, as a matter of procedure for the record, if counsel is showing the witness something I think it should be marked for identification.

The Court: Yes, indeed.

The Clerk: This will be No. 37.

(The document referred to was marked as Plaintiff's Exhibit No. 37 for [342] identification.)

The Court: What do you call this, a ledger, journal, check register?

Mr. Burford: I believe it is—

The Court: Let the witness tell us what it is.

Mr. Burford: Fine.

Q. How would you identify this Plaintiff's Exhibit 37 for identification, Mrs. Higgins?

A. This I would identify as the journal.

Mr. Sherman: Your Honor, since apparently counsel is going to refer to notations, may I accompany counsel?

The Court: Yes.

- Q. (By Mr. Burford): Mrs. Higgins, I show you the page in the general ledger part of the journal referred to as the Trustee Bank Account. Now, would that be White-Ahlgren Trust Account No. 1?
 - A. Yes.
- Q. Now it shows a balance as of certain dates, is that correct? A. Yes, sir.
- Q. Can you state whether to your knowledge you knew whether these balance are correct?

A. To the best of my knowledge, yes.

Q. Would you state for the Court what the balance is as shown to be as of April 30, 1954?

A. \$4,330.71. [343]

The Court: What was the amount?

The Witness: \$4,330.71.

The Court: What was it on March 30th?

The Witness: March 30th it was \$12,249.81.

Mr. Burford: Perhaps, your Honor, we should just go down the line on this to give you an idea of the running account.

Q. Would you state what the balance is shown to be on May 31, 1954?

A. \$12,000—I am sorry.

Q. You can give us both figures.

A. Here I have it straight.

It is an overdraft of \$5,901.75.

Q. Now just prior to that it had shown a balance of what? A. \$129,629.40.

Q. Then there is a payment of what?

A. \$135,531.15.

The Court: In one check?

The Witness: I don't think so, no, sir.

The Court: It just shows one entry?

The Witness: One entry.

Mr. Burford: This is a summary.

Mr. Sherman: This is a ledger, your Honor.

Q. (By Mr. Burford): Now, Mrs. Higgins, you testified that you prepared a [344] schedule of the payments due to suppliers under contract?

A. Yes, sir; I did.

- Q. How did you know what was due?
- A. From the invoices and statements.
- Q. They came to you?
- A. They came to our San Diego office.
- Q. Then you would schedule these?
- A. Yes, sir.
- Q. Did you always do it on a monthly basis?
- A. Yes, sir.
- Q. How did you know what was due in between these?
 - A. I did it once a month, the first of each month.
 - Q. Was everything paid once a month?
 - A. No, sir.
- Q. How did you know what was owing on Friday, for example, when Mr. Van Tassel came down?
- A. I kept a record of what was paid and how much of the account was paid, how much was paid on the account, so I would know at all times the status of the account.
- Q. I believe you testified that when Mr. Van Tassel or another representative of Century came down that representative would inquire as to what was due? A. Yes.
 - Q. Who would be present at those meetings?
 - A. Generally Mr. White. [345]
 - Q. And you? A. And I, yes.
- Q. Let's just take, for example, a supplier for the benefit of the court.

Suppose that you had an amount due for cement or crushed rock, how was that normally paid?

A. The cement was normally paid by the 10th of the following month.

The Court: I think this might be an appropriate time for the recess.

(Short recess.)

The Court: Proceed.

Q. (By Mr. Burford): Mrs. Higgins, at the recess we had just started talking about these material bills.

Now you received these bills for the amount due for, say, mixed concrete or gravel.

Now did Mr. White ever see these bills?

- A. I am sure he did.
- Q. Did you ever hear any discussion in your presence between him and Mr. Van Tassel in regard to the payment of various bills?
- A. Yes, but I can't specify any particular conversations. They did discuss them of course.

The Court: As to the general practice, who in White-Ahlgren [346] Company okayed a material bill for payment?

The Witness: Al White. I would first of all check the calculations—

The Court: Yes?

The Witness: ——to determine that they were accurate.

The Court: Yes?

The Witness: Then Al White would, when he paid or signed the check, would have before him the invoice and he would have the opportunity to check it.

The Court: Who made the determination whether or not White-Ahlgren actually got the material?

The Witness: There would be a packing slip or a delivery slip signed at the time of delivery which I would match up with the invoice to determine that we did receive this.

The Court: Then your regular course of business, I am speaking of now, is that you would present these to Mr. White——

The Witness: Yes.

The Court: ——and he would approve them for payment?

The Witness: In most cases Mr. White, yes.

The Court: Who else?

The Witness: Mr. Ahlgren.

The Court: Mr. Ahlgren or Mr. White?

The Witness: Yes.

The Court: And then it was presented to Mr. Van Tassel? [347]

The Witness: Yes.

- Q. (By Mr. Burford): Now, Mrs. Higgins, directing your attention—I know this is a long time ago and I am not trying to hold you to specific details at all—but do you recall at all the situation with respect to the amount due for mixed concrete about June and July of 1954?
 - A. No sir, not specific or outstanding.
- Q. Do you know whether there were large balances due on or about that date?
 - A. No, sir, I do not know.

Q. Do you recall whether the funds in the bank were ever sufficient during this time to pay all the bills that were due and outstanding at any one time?

Mr. Sherman: Your Honor, may I ask counsel to clarify what he means by "bank," since we have different accounts here.

Mr. Burford: I am referring to the White-Ahlgren Trust Account No. 1, Mrs. Higgins.

The Witness: Never at any time were there enough funds to pay all suppliers.

The Court: And labor?

The Witness: And labor.

The Court: And taxes?

The Witness: That is true, and taxes. [348]

- Q. (By Mr. Burford): Now, Mrs. Higgins, reverting again to April 30, 1954, that is the date this check for payroll taxes was presented, you have testified, I believe, that the procedure was for the individual payroll checks to be paid after they were prepared by you and signed by Mr. White or Mr. Ahlgren and generally Mr. Van Tassel but some representative of The Century Indemnity Company, is that correct?

 A. That is true.
- Q. And that system didn't change on April 30th, that was the same system being followed then?
 - A. Yes.
- Q. The same was true with respect to bills for suppliers about which you have just spoken?
 - A. Yes, sir.
 - Q. So on that date the usual procedure was fol-

lowed, the payroll checks were presented and signed, the bills for suppliers were presented and signed?

- A. Yes.
- Q. And then this check for payroll taxes was presented?

 A. Yes, sir.
- Q. Then refreshing your recollection, I believe you stated that the balance was around \$4300?
- A. Yes, sir, that is true. Do you want the exact figure?
 - Q. You can give the exact figure. [349]
 - A. The book shows \$43,300.71.
- Q. Can you testify that if that check had been signed there wouldn't have been sufficient funds in the bank for the check to clear?
- A. That is true. The check was for more than that.

Mr. Burford: I have no further questions.

The Court: Very well.

Redirect Examination

By Mr. Sherman:

- Q. Mrs. Higgins, I would like to clarify one or two things. The procedure initially carried out with reference to payment of payroll, you said terminated, I believe, January 11th? That is when the new procedure of paying net instead of gross was initiated?

 A. Yes, sir.
- Q. Would you please tell us when the system of paying gross was first started so that we could have our beginning and termination dates.

- A. December 18th, as I recall.
- Q. So to briefly recapitulate, between December 18th and January 11th it was gross, between January 11th and the middle of March it was net, and from the middle of March until the end of the job it was individual checks against the trust account, is that correct? [350] A. Yes, sir.
- Q. Now you testified with reference to what the books show as to bank balance. In whose possession were those books?
- A. These were in the San Diego office in my possession.
- Q. Did Mr. Van Tassel ever ask to see those books?

 A. Not that I recall.
- Q. To the best of your recollection did Mr. Van Tassel ever consult that ledger with reference to what the bank balance was?
 - A. Not that I recall.
- Q. Did you ever verify the balances that you carried in the ledger with what was shown on the bank statements after you received the bank statements?
 - A. No, sir.
- Q. So whether or not, or the extent to which the books were in accord with the bank statements, that was not within your knowledge, is that correct?
 - A. That is true.
- Q. Now, Mrs. Higgins, I believe you further testified that the suppliers were paid from the trust account?

 A. Yes.
 - Q. What suppliers did you have reference to?
 - A. The suppliers for the Pendleton job.

- Q. To your knowledge were there any suppliers with [351] reference to other jobs at that time?
 - A. Not to my knowledge.
- Q. The best you can recall, the suppliers were all paid from the trust account and they all pertained to the Pendleton job?

 A. True.
- Q. Now with reference to which bills of suppliers would be paid and which suppliers would not, did Mr. Van Tassel ever personally direct you to pay any bill?
- A. I recall a telephone conversation regarding Lee Steel.
 - Q. Would you tell us about it?
- A. And he specified the amount he wanted to pay, and I am not sure—

The Court: Is Lee Steel a person or is that the name of a company?

The Witness: Lee Steel is the name of a company that furnished steel, as I recall.

- Q. (By Mr. Sherman): Would you please continue.
- A. And by telephone Mr. Van Tassel asked me to prepare this check, which I did, and mail it to him.

The Court: To whom?

The Witness: To Mr. Van Tassel. [352]

Q. (By Mr. Sherman): I believe you further testified as to the status per the books of the bank account, if there was sufficient funds to pay taxes. Is it not true that there was not sufficient funds because other types of items were preferred for payment?

The Court: That is a leading question, Counsel, and I do not think it is proper redirect. I think you went into that matter on direct examination.

Mr. Sherman: Pardon me.

The Court: You went into that matter on the direct examination of this witness.

Mr. Sherman: I merely asked the witness—

The Court: You just want to nail it down a little.

Mr. Sherman: Well, I think that an inference exists in the record from the cross-examination that I would like the record to fairly portray.

Q. Let me ask you this question, Mrs. Higgins.

At the time that you presented this check to Mr. Van Tassel for taxes, which he didn't countersign, did he in any way indicate to you that you should prepare a check for the balance that was in existence and he would sign it?

A. No, sir. [353]

Cross-Examination

By Mr. Burford:

- Q. Mrs. Higgins, you were the bookkeeper—
- A. Yes, sir.
- Q. ——and you stated that you never reconciled your books with the bank statement?
 - A. The public accountant did that.
 - Q. But you had the benefit of that information?
 - A. I could have had, yes, sir.
- Q. Did you know what cash was actually in the bank at any particular time?

- A. Yes, I kept a running balance.
- Q. You did keep a running balance?
- A. Yes, sir.
- Q. Did you ever yourself consult with Mr. Van Tassel in any way about his running balance or reconciling with him as to what was in the bank?
- A. Each Friday we would reconcile with each other.
- Q. So you did have a conference with respect to what was in the bank and what could be available for payments?

 A. Yes, sir.
- Q. Now, Mrs. Higgins, would you recall about how much money was involved in these first gross payroll checks which went to the White-Ahlgren general account?
 - A. Will an estimate be sufficient? [354]
- Q. If you can make a reasonable estimate. We are not trying to hold you to a particular amount. Would it be substantial?
 - A. There would be around \$10,000.
 - Q. Around \$10,000? A. Yes.
 - Q. That is your best estimate?
 - A. I think so.
- Q. Now the payrolls which were represented by this \$10,000 were actually drawn on the trust account No. 1, were they not?

 A. Yes.
- Q. So you had \$10,000 going out of Trust Account No. 1 in the White-Ahlgren general account and then another \$10,000 going out of the trust account for the same payroll?

 A. Yes, sir.

Mr. Burford: No further questions.

Redirect Examination

By Mr. Sherman:

Q. Was it your understanding at that time that this was with the consent of Eva Cole?

A. Yes, sir.

Mr. Sherman: No further questions. [355]

* * *

The Court: I would make a finding that there is no showing here that The Century Indemnity Company had the right and the power to go in and to hire any particular person or to fire a particular person, or to tell him where to pour the concrete, or when to pour it, or how to pour it, or what time to go to work or what time to come home. There is no evidence here to support any finding that they had any such authority.

Mr. Sherman: I don't when the Court says they had any such authority whether the Court means by law or by contract.

The Court: By law or by contract or in fact, from the evidence in the case.

Mr. Sherman: Do I understand the Court to be making a finding that they never exercised that control?

The Court: I am finding that they did not have that power in fact or by contract, and never exercised it, both. [396]

* * *

The Court: Under the evidence I don't think Century Indemnity had any control of the job or the hiring or firing of anybody or of the doing of any work or the time of doing it.

Mr. Burford: There is no point in my pursuing that further then.

The Court: Or the manner of doing it or the method by which it should be done or when it should be started or completed. [408]

* * *

OPINION

I have listened with interest to the argument but I have indicated here that as a matter of fact from the evidence in the case it does not show that The Century Indemnity Company has any control of the persons employed, the manner or time or doing their work, when they started or when they finished, or of the purchase of any materials or from whom they should be purchased or how the work should be done, or when it should be done or the manner in which it should be performed. For that reason I do not think that they come within the definition of 1426 of the 1939 Code where the tax is due by an employer where the common-law relationship of an employer and employee exists, and for that reason judgment will be for the plaintiff on Counts 2 and 3.

On Count 1, I think the taxes that were due to March 18th come clearly within the Simpson case and the [411] Fireman's Fund case, within the facts of those cases. The facts here are the same and are

controlled by those cases. The plaintiff will have judgment for the return of whatever sum of money the taxes were to March 18th on the first count of the indictment.

But as to the balance of this money due under the first count of the indictment, this is controlled by the definition set forth in 1621(d), and I am satisfied from all of the evidence that while there was a joint control, it was a control which is equal to the veto power, about which we have learned a great deal lately, and therefore is a control, and that means The Century Indemnity Company had control within the terms and provisions of Section 1621(d) of the payment of the wages to the employees after March 18th insofar as the taxes are concerned in Count 1, and judgment will be for the defendant as to that sum of money.

I have not been able to calculate it, but I merely announce my decision so you will prepare your findings of fact and conclusions of law accordingly.

I do not think there is any other issue to be found on it.

[Endorsed]: Filed January 13, 1961.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

Names and Addresses of Attorneys.

Complaint, filed 10/7/58.

Summons, dated 10/7/58.

Answer, filed 12/8/58.

Notice of Motion and Motion of Plaintiff for discovery, filed 3/5/59.

Affidavit of Arthur H. Deibert, filed 3/13/59.

Minute Order 3/26/59 re hearing on motion for discovery.

Opposition by Defendant to Plaintiff's Motion for discovery under F.R.C.P. 34, filed 3/31/59.

Reply to opposition by Defendant to Plaintiff's motion for discovery under F.R.C.P. 34, filed 4/7/59.

Minute Order 4/8/59 re hearing on motion plaintiff for discovery.

Order granting Petitioner's motion for discovery under F.R.C.P. 34, filed 4/10/59.

Notice of Appearance of Burton A. Van Tassel, as co-counsel, filed 5/8/59.

Plaintiff's Memorandum of Contentions of Fact and Law, filed 9/25/59.

Defendant's Memorandum of Contentions of Fact and Law, filed 10/5/59.

Pretrial Conference Order, filed 10/5/59.

Minute Order 10/5/59 re setting for trial.

Minute Order 11/30/59 re setting for trial.

Plaintiff's Trial Memorandum, filed 9/9/60.

Amended and Supplemental Pre-Trial Conference Order, filed 9/13/60.

Minute Order 9/13/60 re setting for trial.

Minute Order 9/20/60 re trial.

Minute Order 9/21/60 re further trial.

Minute Order 9/27/60 re further trial.

Minute Order 10/4/60 re further trial.

Minute Order 10/5/60 re further trial.

Defendant's objections to Plaintiff's proposed Findings of Fact, Conclusions of Law and Judgment, filed 11/10/60.

Stipulation and Order extending Defendant's time to file objections, filed 11/9/60.

Defendant's proposed Findings of Fact, Conclusions of Law and Judgment, lodged 11/10/60.

Stipulation and Order extending Plaintiff's time to file reply to Defendant's objections, filed 11/14/60.

Plaintiff's reply to Defendant's objections to Plaintiff's proposed Findings of Fact, Conclusions of Law and Judgment, filed 11/17/60.

Request for oral hearing on Findings of Fact and Order thereon, filed 11/22/60.

Minute Order 12/5/60 re hearing on objections to proposed findings, etc.

Certificate of Probable Cause, filed 12/5/60.

Findings of Fact, Conclusions of Law and Judgment, filed 12/5/60, entered 12/6/60.

(Copy) Clerk's notice of entry of judgment, dated 12/6/60.

Plaintiff's Bill of Costs, filed 12/7/60.

Objections to Plaintiff's Bill of Costs.

(Copy) Letter of December 30, 1960, retaxing of costs.

Motion to re-tax costs and request for oral hearing thereon, filed 1/4/61.

Defendant's Points and Authorities in opposition to Plaintiff's motion to re-tax costs, filed 1/12/61.

Minute Order 1/16/61 re hearing on motion to retax costs.

Order re-taxing costs, filed 1/18/61.

Notice of Appeal filed by Plaintiff, filed 2/2/61.

Notice of Cross Appeal filed by Defendant 2/3/61.

Defendant's motion for extension of time to docket cause on cross-appeal and order, filed 2/24/61.

Plaintiff's motion for extension of time to docket cause on appeal and order, filed 3/9/61.

Appellant's Designation of record, filed 4/21/61.

Statement of Points Appellant the Century Indemnity Company intends to rely on on appeal, filed 4/21/61.

Designation of contents of record on cross-appeal, filed 4/25/61.

Three volumes of Reporter's Transcript of proceedings had on:

Sept. 20 and 21, 1960 (excerpts of testimony of certain witnesses) (Pages 1 to 62).

Sept. 20 and 21, 1960 (Trial proceedings).

October 4 and 5, 1960 (Trial proceedings).

Plaintiff's Exhibits: 1 (Pretrial order), 1-A (Amended and supplemental pretrial order), 2, 3,

4-A, 4-B, 4-C, 4-D, 5, 10, 12, 13, 14, 15, 16, 20, 24, 25, 27, 28, 29, 30, 31, 36 and 37.

Defendant's Exhibits: A, B, C, D, E, F, G, H, I, J, U, V, W, X, Y, Z, AB, AC, AD, AE.

Dated: April 28, 1961.

[Seal] JOHN A. CHILDRESS, Clerk.

By /s/ WM. A. WHITE, Deputy Clerk.

[Endorsed]: No. 17354. United States Court of Appeals for the Ninth Circuit. Century Indemnity Company, Appellant, vs. Robert A. Riddell, etc., Appellee, and Robert A. Riddell, etc., Appellant, vs. Century Investment Co., Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed April 29, 1961.

Docketed May 8, 1961.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 17354

THE CENTURY INDEMNITY COMPANY, a Corporation,

Plaintiff-Appellant,

VS.

ROBERT A. RIDDELL, District Director of Internal Revenue for the Los Angeles District of California,

Defendant-Appellee.

STIPULATION AND ORDER RE ABBREVIATION OF THE PRINTED RECORD

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel of record, because of the voluminous exhibits offered and introduced into evidence in the Court below, and in order to abbreviate the scope and economize the costs of the printed record, that all the exhibits may be considered in their original form by the Court and counsel in their briefs and oral argument and need not be printed; subject to the right of either party to designate for printing any portion of said exhibits.

Dated: May 15, 1961.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ ARTHUR H. DEIBERT,
Attorneys for Appellant.

FRANCIS C. WHELAN,
United States Attorney;

ROBERT H. WYSHAK,
Assistant U. S. Attorney,
Chief, Tax Division;

By /s/ EUGENE N. SHERMAN, Attorneys for Appellee.

ORDER

It Is So Ordered this 23rd day of May, 1961.

/s/ STANLEY N. BARNES,

United States Circuit Judge.

[Endorsed]: Filed May 25, 1961.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER FOR CORREC-TION OF REPORTER'S TRANSCRIPT OF PROCEEDINGS

It Is Hereby Stipulated by and between the parties hereto, through their counsel of record, that the word "White-" be inserted after the word "meaning" and before the word "Ahlgren" on page 184, line 7, of the official reporter's transcript of proceedings for September 21, 1960, so that said line reads as follows:

"meaning White-Ahlgren"

and that the printing of said reporter's transcript contain this correction.

Dated: May 31, 1961.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ ARTHUR H. DEIBERT,

Attorneys for AppellantCross-Appellee.

FRANCIS C. WHELAN,
United States Attorney;

ROBERT H. WYSHAK,

Assistant U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN,
Assistant U. S. Attorney;

/s/ EUGENE N. SHERMAN,
Attorneys for AppelleeCross-Appellant.

ORDER

Good Cause Appearing Therefor, it is so ordered this 6th day of June, 1961.

/s/ O. D. HAMLIN,
United States Circuit Judge;

/s/ FREDERICK G. HAMLEY,
United States Circuit Judge;

/s/ RICHARD H. CHAMBERS,
United States Circuit Judge.

[Endorsed]: Filed June 7, 1961.

[Title of Court of Appeals and Cause.]

AMENDED STATEMENT OF POINTS UPON WHICH CROSS-APPELLANT INTENDS TO RELY ON CROSS-APPEAL

Cross-appellant, Robert A. Riddell, hereby amends the Statement of Points Upon Which Cross-Appellant Intends to Rely on Cross-Appeal, previously filed herein, and pursuant to the provisions of Rule 17(6) of the Rules of this Court, designates only the following as the points upon which cross-appellant intends to rely on cross-appeal:

- 1. The Trial Court erred in finding that plaintiff did not have control of the payment of the wages of the employees of White-Ahlgren Company, Inc., for the services rendered by said employees between December 7, 1953, and March 8, 1954.
- 2. The Trial Court erred in failing to find that plaintiff required the opening of the "White-Ahlgren Trust Account No. 1" as a condition precedent

to its issuance of the surety bond, described as contract bond No. 291379.

- 3. The Trial Court erred in concluding that plaintiff was not the "employer" of the employees of White-Ahlgren Company, Inc., for the period between December 7, 1953, and March 8, 1954, within the meaning of Secs. 1621(d), 1622(a) and 1623 of the Internal Revenue Code of 1939, as amended.
- 4. The Trial Court erred in concluding that plaintiff is not liable to defendant for the payment of the Withholding taxes for the period between December 7, 1953, and March 8, 1954, required to be deducted, withheld and paid by said Secs. 1622 (a) and 1623 and is entitled to judgment against defendant for refund of the taxes, delinquency penalty and interest so paid for said period.
- 5. The Trial Court erred in decreeing judgment for plaintiff against defendant for refund of Withholding taxes, delinquency penalty and interest for the period between December 7, 1953, and March 8, 1954, paid by plaintiff to defendant.
- 6. The Trial Court erred in ordering the retaxing of plaintiff's costs of suit, and in decreeing judgment for plaintiff against defendant for said costs in the following particulars:
- (a) Fees of the Clerk.....\$15.00
- (b) Fees of the Marshal..... 5.50

(c)	rees of the Court Reporter for an or	
	any part of the transcript necessarily	
	obtained for use in the case	77.50
(d)	Docket fees under 28 U.S.C. 1923	27.50
(e)	Costs incident to taking of depositions	55.80
Dated: June 13, 1961.		

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/s/ EUGENE N. SHERMAN,
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[Endorsed]: Filed June 15, 1961.